

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1.  
INTRODUCTION/(1) INTRODUCTION AND SCOPE OF THE TITLE/1. Introduction to competition law.

## **COMPETITION (VOLUME 18 (2009) 5TH EDITION)**

### **1. INTRODUCTION**

#### **(1) INTRODUCTION AND SCOPE OF THE TITLE**

##### **1. Introduction to competition law.**

The aim of competition law is to protect consumers from the effects of ineffective competition. Such effects include price fixing, resale price maintenance, lack of choice and inefficiency. In order to combat the problem of ineffective competition, competition law seeks to control anti-competitive agreements, abusive behaviour, certain mergers and state interference<sup>1</sup>. In recent years, the common law has been supplanted in most cases by statutory law<sup>2</sup>, coupled with European Community legislation<sup>3</sup>. In a small number of cases, the common law decisions on monopolies<sup>4</sup> and restraint of trade<sup>5</sup> remain of importance.

1 See PARA 115 et seq.

2 See in particular the Competition Act 1998 (see PARA 115 et seq) and the Enterprise Act 2002 (see PARA 171 et seq).

3 See PARA 24 et seq.

4 See PARA 361 et seq.

5 See PARA 369 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1.  
INTRODUCTION/(1) INTRODUCTION AND SCOPE OF THE TITLE/2. Scope of the title.

##### **2. Scope of the title.**

This title sets out a brief history of the development of competition law in the United Kingdom<sup>1</sup>. The administrative authorities concerned with the enforcement of competition law are discussed<sup>2</sup>. The provisions of the Competition Act 1998<sup>3</sup> and the Enterprise Act 2002<sup>4</sup> are set out and there is a detailed discussion of the principles of European Community competition law<sup>5</sup>. Finally, the related issues of monopolies and restraint of trade are discussed<sup>6</sup>.

1 See PARAS 361-364.

2 See PARAS 5-17.

3 See PARA 115 et seq.

4 See PARA 171 et seq.

5 See PARA 24 et seq.

6 See PARA 361 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(1) INTRODUCTION AND SCOPE OF THE TITLE/3. Application of domestic competition law to particular agreements and practices.

### **3. Application of domestic competition law to particular agreements and practices.**

The domestic competition law of the United Kingdom consists of the Enterprise Act 2002, which contains provisions for the control of mergers<sup>1</sup>, provides for the making of market investigation references<sup>2</sup> and introduces criminal offences for those involved in cartels<sup>3</sup>, and the Competition Act 1998, which prohibits agreements that prevent, restrict or distort competition<sup>4</sup> and the abuse of a dominant position<sup>5</sup>.

The Restrictive Trade Practices Act 1976, the Resale Prices Act 1976, the Restrictive Trade Practices Act 1977 and the provisions in the Competition Act 1980 for the investigation of anti-competitive practices were repealed with effect from 1 March 2000<sup>6</sup>.

In any case where domestic competition law may be applicable, it is also necessary to consider the possible application of the competition rules contained in Community law<sup>7</sup>.

1 See PARAS 172-275.

2 See PARAS 276-318.

3 See PARAS 319-325.

4 See PARAS 116-124.

5 See PARAS 125-128.

6 Competition Act 1998 ss 1, 74(3), Sch 14 Pt I.

7 See PARAS 4, 24 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(1) INTRODUCTION AND SCOPE OF THE TITLE/4. European Community law.

### **4. European Community law.**

The EC Treaty<sup>1</sup> prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market<sup>2</sup>. In particular, the following agreements are prohibited: (1) those which directly or indirectly fix purchase or selling prices or other trading conditions<sup>3</sup>; (2) those which limit or control production, markets, technical development or investment<sup>4</sup>; (3) those

which share markets or sources of supply<sup>5</sup>; (4) those which apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage<sup>6</sup>; and (5) those which make the conclusion of contracts subject to the acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts<sup>7</sup>.

The EC Treaty<sup>8</sup> also prohibits any abuse by one or more undertakings of a dominant position<sup>9</sup> within the common market or in a substantial part of it<sup>10</sup> in so far as it may affect trade between member states<sup>11</sup>. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions<sup>12</sup>; (b) limiting production, markets or technical development to the prejudice of consumers<sup>13</sup>; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage<sup>14</sup>; (d) making the concluding of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts<sup>15</sup>.

Undertakings entrusted by a member state with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules of competition contained in the Treaty<sup>16</sup>, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them<sup>17</sup>.

Merger control is also regulated by the European Commission<sup>18</sup> where mergers go beyond the national borders of a member state. If the annual turnover of the combined businesses exceeds specified thresholds in terms of global and European sales, the proposed merger must be notified to the European Commission for examination<sup>19</sup>. Below these thresholds, the national competition authorities in the member states may review the merger<sup>20</sup>. The European Commission may also examine mergers which are referred to it from the national competition authorities of the member states<sup>21</sup>. All proposed mergers notified to the Commission are examined to see if they would significantly impede effective competition<sup>22</sup>. If they do not, they are approved unconditionally. If they do, they may be prohibited or approved with conditions<sup>23</sup>.

1 See the EC Treaty art 81. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. See further PARA 61 et seq.

2 See the EC Treaty art 81(1).

3 EC Treaty art 81(1)(a).

4 EC Treaty art 81(1)(b).

5 EC Treaty art 81(1)(c).

6 EC Treaty art 81(1)(d).

7 EC Treaty art 81(1)(e).

8 See the EC Treaty art 82.

9 As to the meaning of 'dominant position' see PARA 69.

10 As to the meaning of 'substantial part of the common market' see PARA 70.

11 EC Treaty art 82. The examples given in heads (a)-(d) in the text are not exhaustive.

12 EC Treaty art 82(2)(a).

13 EC Treaty art 82(2)(b).

14 EC Treaty art 82(2)(c).

- 15 EC Treaty art 82(2)(d).
- 16 This includes in particular the provisions of the EC Treaty art 82: art 86(2).
- 17 EC Treaty art 86(2). However, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community: art 86(2). As to art 86(2) see PARA 27.
- 18 See EC Council Regulation 139/2004 on the control of concentrations between undertakings (the 'EC Merger Regulation') (OJ L24, 29.1.2004, p 1). See further PARA 73 et seq.
- 19 See the EC Merger Regulation arts 1, 4, 5.
- 20 See the EC Merger Regulation art 4.
- 21 See the EC Merger Regulation art 22.
- 22 See the EC Merger Regulation art 6.
- 23 See the EC Merger Regulation art 8.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(i) The Secretary of State/5. Government departments and the Secretary of State.

## **(2) ADMINISTRATIVE AUTHORITIES**

### **(i) The Secretary of State**

#### **5. Government departments and the Secretary of State.**

Government responsibility in relation to competition matters is vested in the Department for Business, Innovation and Skills ('BIS')<sup>1</sup>. Matters relating to competition were originally within the general jurisdiction of the Board of Trade<sup>2</sup> and then fell under the remit of the Department of Trade and Industry<sup>3</sup> before being transferred to the Department for Business, Enterprise and Regulatory Reform<sup>4</sup> and then to BIS.

1 In any enactment, 'Secretary of State' means one of Her Majesty's principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. In this title, unless the context otherwise requires, the Secretary of State referred to is generally to be taken to be the Secretary of State for Business, Innovation and Skills. BIS was created on 5 June 2009 by a merger between the Department for Business, Enterprise and Regulatory Reform and the Department for Innovation, Universities and Skills.

2 As to the Board of Trade see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 505.

3 Specialised ministries were established such as those relating to technology, power, science and aviation. In 1970 certain powers previously exercised by such ministries were transferred to the Secretary of State, which in practice meant the Secretary of State for Trade and Industry, who was also empowered to exercise concurrently the powers of the Board of Trade: see the Secretary of State for Trade and Industry Order 1970, SI 1970/1537. In 1974 the Department of Trade and Industry was divided and its functions transferred en bloc to the Secretary of State and distributed by administrative arrangements among the four successor Departments of Trade, Industry, Energy and Prices and Consumer Protection: see the Secretary of State (New Departments) Order 1974, SI 1974/692; and the Secretary of State for Trade Order 1979, SI 1979/578.

In 1983 the Departments of Trade and of Industry were once again amalgamated to form a single department, known as the Department of Trade and Industry, and the functions of the Secretary of State for Trade and the Secretary of State for Industry were transferred en bloc to the Secretary of State for Trade and Industry: see the Transfer of Functions (Trade and Industry) Order 1983, SI 1983/1127.

<sup>4</sup> See the Secretaries of State for Children, Schools and Families, for Innovation, Universities and Skills and for Business, Enterprise and Regulatory Reform Order 2007, SI 2007/3224, art 11.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1.  
INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(ii) The Office of Fair Trading/6.  
Establishment and constitution of the Office of Fair Trading.

## **(ii) The Office of Fair Trading**

### **6. Establishment and constitution of the Office of Fair Trading.**

The Office of Fair Trading (the 'OFT') is the United Kingdom's consumer protection and competition authority. The OFT was established as a statutory body corporate on 1 April 2003 by the Enterprise Act 2002<sup>1</sup>. It replaced the Director General of Fair Trading<sup>2</sup>, whose functions, property, rights and liabilities were transferred to the OFT<sup>3</sup>. The functions of the OFT are carried out on behalf of the Crown<sup>4</sup>.

In managing its affairs the OFT is required to have regard, in addition to any relevant general guidance as to the governance of public bodies, to such generally accepted principles of good corporate governance as it is reasonable to regard as applicable to the OFT<sup>5</sup>.

The OFT consists of a chairman and no fewer than four other members, appointed by the Secretary of State<sup>6</sup>. The chairman and other members hold and vacate office in accordance with the terms of their respective appointments<sup>7</sup>, and the appointment is for a term not exceeding five years<sup>8</sup>. A person holding office may resign that office by giving notice in writing to the Secretary of State and may be removed from office by the Secretary of State on the ground of incapacity or misbehaviour<sup>9</sup>. A previous appointment as chairman or other member does not affect a person's eligibility for appointment to either office<sup>10</sup>.

The OFT must pay to the chairman and other members such remuneration, and such travelling and other allowances, as may be determined by the Secretary of State<sup>11</sup>. The OFT, if required to do so by the Secretary of State, must pay, or pay towards, such pension, allowances or gratuities as may be determined by the Secretary of State to or in respect of a person who holds or has held office as chairman or other member<sup>12</sup>. If, where any person ceases to hold office as chairman or other member, the Secretary of State determines that there are special circumstances which make it right that he should receive compensation, the OFT must pay to him such amount by way of compensation as the Secretary of State may determine<sup>13</sup>.

After consulting the chairman, the Secretary of State must appoint a person to act as chief executive of the OFT on such terms and conditions as the Secretary of State may think appropriate<sup>14</sup>. A person appointed as chief executive may not at the same time be chairman<sup>15</sup>. The OFT may, with the approval of the minister for the Civil Service as to numbers and terms and conditions of service, appoint such other staff as it may determine<sup>16</sup>.

The members of a committee or sub-committee of the OFT may include persons who are not members of the OFT, and a sub-committee may include persons who are not members of the committee which established it<sup>17</sup>.

The OFT may regulate its own procedure, including quorum<sup>18</sup> but must consult the Secretary of State before making or revising its rules and procedures for dealing with conflicts of interest<sup>19</sup>.

The application of the seal of the OFT is authenticated by the signature of any member or other person who has been authorised for that purpose by the OFT, whether generally or specially<sup>20</sup>. A document purporting to be duly executed under the seal of the OFT, or signed on its behalf,

must be received in evidence and, unless the contrary is proved, be taken to be so executed or signed<sup>21</sup>.

Anything authorised or required to be done by the OFT may be done by any member or employee of the OFT who is authorised for that purpose by the OFT, whether generally or specially, and any committee<sup>22</sup> of the OFT which has been so authorised<sup>23</sup>.

The OFT has power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions<sup>24</sup>.

Any action taken by or on behalf of the OFT in the exercise of its administrative functions may be investigated by the Parliamentary Commissioner for Administration<sup>25</sup>. Members of the OFT are disqualified for membership of the House of Commons<sup>26</sup> and the Northern Ireland Assembly<sup>27</sup>.

1 Enterprise Act 2002 s 1(1).

2 The office of the Director General of Fair Trading was established by the Fair Trading Act 1973 s 1 (repealed).

3 Enterprise Act 2002 s 2(1), (2). Any enactment, instrument or other document passed or made before 1 April 2003 which refers to the Director General of Fair Trading has effect, so far as necessary for the purposes of or in consequence of anything being transferred, as if any reference to the Director were a reference to the OFT: s 2(3).

4 Enterprise Act 2002 s 1(2).

5 Enterprise Act 2002 s 1(4).

6 Enterprise Act 2002 s 1(3), Sch 1 para 1(1). As to the Secretary of State see PARA 5. The Secretary of State must consult the chairman before appointing any other member: Sch 1 para 1(2). The validity of anything done by the OFT is not affected by a vacancy among its members or by a defect in the appointment of a member: Sch 1 para 9.

7 Enterprise Act 2002 Sch 1 para 2(1). The terms of appointment of the chairman and other members are determined by the Secretary of State: Sch 1 para 2(2).

8 Enterprise Act 2002 Sch 1 para 3(1).

9 Enterprise Act 2002 Sch 1 para 3(2).

10 Enterprise Act 2002 Sch 1 para 3(3).

11 Enterprise Act 2002 Sch 1 para 4(1).

12 Enterprise Act 2002 Sch 1 para 4(2).

13 Enterprise Act 2002 Sch 1 para 4(3).

14 Enterprise Act 2002 Sch 1 para 5(1).

15 Enterprise Act 2002 Sch 1 para 5(2), (3).

16 Enterprise Act 2002 Sch 1 para 6. As to the minister for the Civil Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 549 et seq.

17 Enterprise Act 2002 Sch 1 para 7.

18 Enterprise Act 2002 Sch 1 para 8(1).

19 Enterprise Act 2002 Sch 1 para 8(2). The OFT must from time to time publish a summary of its rules and procedures for dealing with conflicts of interest: Sch 1 para 8(3).

20 Enterprise Act 2002 Sch 1 para 10(1). This does not apply in relation to any document which is, or is to be, signed in accordance with the law of Scotland: Sch 1 para 10(2).

21 Enterprise Act 2002 Sch 1 para 11.

22 This does not apply to a committee whose members include any person who is not a member or employee of the OFT: Enterprise Act 2002 Sch 1 para 12(2).

23 Enterprise Act 2002 Sch 1 para 12(1).

24 Enterprise Act 2002 Sch 1 para 13. As to the functions of the OFT see PARA 7.

25 See the Parliamentary Commissioner Act 1967 Sch 2 (amended by the Enterprise Act 2002 Sch 1 para 14); and **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 43. As to the Parliamentary Commissioner for Administration see **ADMINISTRATIVE LAW** vol 1(1) (2001 Reissue) PARA 41 et seq.

26 See the House of Commons Disqualification Act 1975 Sch 1 Pt II (amended by the Enterprise Act 2002 Sch 1 para 15).

27 See the Northern Ireland Assembly Disqualification Act 1975 Sch 1 Pt 2 (amended by the Enterprise Act 2002 Sch 1 para 16).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(ii) The Office of Fair Trading/7. General functions of the Office of Fair Trading and annual plan and reports.

## **7. General functions of the Office of Fair Trading and annual plan and reports.**

The Office of Fair Trading (the 'OFT') has the following general functions:

- (1) obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions<sup>1</sup>;
- (2) making the public aware of the ways in which competition may benefit consumers in, and the economy of, the United Kingdom<sup>2</sup> and giving information or advice in respect of matters relating to any of its functions to the public<sup>3</sup>;
- (3) making proposals, or giving other information or advice, on matters relating to any of its functions to any minister of the Crown or other public authority, including proposals, information or advice as to any aspect of the law or a proposed change in the law<sup>4</sup>;
- (4) promoting good practice in the carrying out of activities which may affect the economic interests of consumers in the United Kingdom<sup>5</sup>.

The OFT must, before each financial year, publish an annual plan containing a statement of its main objectives and priorities for the year<sup>6</sup>. For the purposes of public consultation, the OFT must publish a document containing proposals for its annual plan at least two months before publishing the annual plan for any year<sup>7</sup>. The proposal document and annual plan must be laid before Parliament by the OFT<sup>8</sup>.

As soon as practicable after the end of each financial year, the OFT must make an annual report to the Secretary of State<sup>9</sup> on its activities and performance during that year<sup>10</sup>. The OFT must lay a copy of each annual report before Parliament and arrange for the report to be published<sup>11</sup>.

The OFT may prepare other reports in respect of matters relating to any of its functions and arrange for any such report to be published<sup>12</sup>.

1 Enterprise Act 2002 s 5(1). This function is to be carried out with a view to, among other things, ensuring that the OFT has sufficient information to take informed decisions and to carry out its other functions effectively: s 5(2). In carrying out this function the OFT may carry out, commission or support (financially or otherwise) research: s 5(3).

2 As to the meaning of 'United Kingdom' see PARA 401 note 1.

3 Enterprise Act 2002 s 6(1). In carrying out these functions the OFT may: (1) publish educational materials or carry out other educational activities; or (2) support (financially or otherwise) the carrying out by others of such activities or the provision by others of information or advice: s 6(2).

4 Enterprise Act 2002 s 7(1). A minister of the Crown may request the OFT to make proposals or give other information or advice on any matter relating to any of its functions, and the OFT, so far as is reasonably practicable and consistent with its other functions, must comply with the request: s 7(2).

5 Enterprise Act 2002 s 8(1). In carrying out this function the OFT may, without prejudice to the generality of s 8(1), make arrangements for approving consumer codes and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code: s 8(2). 'Consumer code' means a code of practice or other document, however described, intended, with a view to safeguarding or promoting the interests of consumers, to regulate by any means the conduct of persons engaged in the supply of goods or services to consumers (or the conduct of their employees or representatives): s 8(6). Any arrangements under s 8(2) must specify the criteria to be applied by the OFT in determining whether to give approval to or withdraw approval from a consumer code: s 8(3). Any such arrangements may in particular: (1) specify descriptions of consumer code which may be the subject of an application to the OFT for approval (and any such description may be framed by reference to any feature of a consumer code, including the persons who are, or are to be, subject to the code, the manner in which it is, or is to be, operated and the persons responsible for its operation); and (2) provide for the use in accordance with the arrangements of an official symbol intended to signify that a consumer code is approved by the OFT: s 8(4). The OFT must publish any arrangements under s 8(2) in such manner it considers appropriate: s 8(5).

6 Enterprise Act 2002 s 3(1).

7 Enterprise Act 2002 s 3(2).

8 Enterprise Act 2002 s 3(3).

9 As to the Secretary of State see PARA 5.

10 Enterprise Act 2002 s 4(1). The annual report for each year must include: (1) a general survey of developments in respect of matters relating to the OFT's functions; (2) an assessment of the extent to which the OFT's main objectives and priorities for the year (as set out in the annual plan (see the text to note 6)) have been met; (3) a summary of the significant decisions, investigations or other activities made or carried out by the OFT during the year; (4) a summary of the allocation of the OFT's financial resources to its various activities during the year; and (5) an assessment of the OFT's performance and practices in relation to its enforcement functions: s 4(2).

11 Enterprise Act 2002 s 4(3).

12 Enterprise Act 2002 s 4(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(ii) The Office of Fair Trading/8. Super-complaints to the Office of Fair Trading.

## **8. Super-complaints to the Office of Fair Trading.**

Where a designated consumer body<sup>1</sup> makes a complaint to the Office of Fair Trading (the 'OFT') or another specified regulator<sup>2</sup> that any feature, or combination of features, of a market in the United Kingdom for goods or services<sup>3</sup> is or appears to be significantly harming the interests of consumers<sup>4</sup>, then within 90 days<sup>5</sup> after the day on which it receives the complaint, the OFT, or other regulator, must publish a response stating how it proposes to deal with the complaint,



and in particular whether it has decided to take any action, or to take no action, in response to the complaint, and if it has decided to take action, what action it proposes to take<sup>6</sup>. The response must state reasons for the proposals<sup>7</sup>.

The OFT must issue guidance as to the presentation by the complainant of a reasoned case for the complaint, and may issue such other guidance as appears to it to be appropriate for these purposes<sup>8</sup>.

1 'Designated consumer body' means a body designated by the Secretary of State by order: Enterprise Act 2002 s 11(5). An order under s 11 must be made by statutory instrument and is subject to annulment in pursuance of a resolution of either House of Parliament: s 11(8). The Secretary of State: (1) may designate a body only if it appears to him to represent the interests of consumers of any description; and (2) must publish (and may from time to time vary) other criteria to be applied by him in determining whether to make or revoke a designation: s 11(6). 'Consumer' means an individual who is a consumer within the meaning of Pt 4 (ss 131-184): s 11(9)(b). 'Consumer' means any person who is: (a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them; or (b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them; and who does not receive or seek to receive the goods or services in the course of a business carried on by him: s 183(1). As to the Secretary of State see PARA 5. The following bodies have been designated: the Campaign for Real Ale Limited, the Consumer Council for Water, the Consumers' Association, the General Consumer Council for Northern Ireland, the National Association of Citizens Advice Bureaux and the National Consumer Council: Enterprise Act 2002 (Bodies Designated to make Super-complaints) Order 2004, SI 2004/1517, art 2, Schedule (substituted by SI 2008/2161).

2 The Secretary of State may by order provide that the Enterprise Act 2002 s 11 is to apply to complaints made to a specified regulator in relation to a market of a specified description as it applies to complaints made to the OFT, with such modifications as may be specified: s 205(1). Such an order must be made by statutory instrument, and is subject to annulment in pursuance of a resolution of either House of Parliament: s 205(2). 'Regulator' has the meaning given in the Competition Act 1998 s 54(1) (see PARA 147); and 'specified' means specified in the order: Enterprise Act 2002 s 205(3). The following regulators have been specified for the purposes of super-complaints: the Office of Communications, the Gas and Electricity Markets Authority, the Director General of Electricity Supply for Northern Ireland, the Director General of Gas for Northern Ireland, the Water Services Regulation Authority, the Office of Rail Regulation and the Civil Aviation Authority: Enterprise Act 2002 (Super-complaints to Regulators) Order 2003, SI 2003/1368, art 2, Schedule (amended by the Railways and Transport Safety Act 2003 s 16, Sch 3 para 4; SI 2003/3182; SI 2006/522). As to the regulators see also PARAS 18-22, 147.

3 References to a feature of a market in the United Kingdom for goods or services have the same meaning as if contained in the Enterprise Act 2002 Pt 4 (see PARA 276): s 11(9)(a). As to the meaning of 'United Kingdom' see PARA 401 note 1.

4 Enterprise Act 2002 s 11(1).

5 The Secretary of State may by order substitute any other period: see the Enterprise Act 2002 s 11(4). At the date at which this volume states the law no such order had been made.

6 Enterprise Act 2002 s 11(2).

7 Enterprise Act 2002 s 11(3).

8 Enterprise Act 2002 s 11(7).

## UPDATE

### 8 Super-complaints to the Office of Fair Trading

NOTE 1--SI 2004/1517 Schedule substituted: SI 2009/2079.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(iii) The Competition Commission/9. Constitution of the Commission.

### **(iii) The Competition Commission**

#### **9. Constitution of the Commission.**

The Competition Commission (the 'Commission') is a body corporate<sup>1</sup> having such functions as are conferred on it by or as a result of the Competition Act 1998<sup>2</sup>. The former Monopolies and Mergers Commission was dissolved by the Competition Act 1998 and its functions transferred to the Competition Commission<sup>3</sup>.

The Commission consists of members appointed by the Secretary of State to form a panel for the purposes of its general functions<sup>4</sup>. There are also members appointed from specialist panels, namely the utilities (water, electricity, gas and energy code modification appeals) panel, the newspaper panel and the Communications Act panel<sup>5</sup>. A person may be appointed as a member of more than one kind<sup>6</sup>. A person may not be, at the same time, a member of the Commission and a member of the Competition Appeal Tribunal<sup>7</sup>. Each member holds and vacates office in accordance with the terms of his appointment<sup>8</sup> and may not be appointed as a member for more than eight years<sup>9</sup>. Any member may at any time resign by notice in writing to the Secretary of State<sup>10</sup>. The Secretary of State may remove a member on the ground of incapacity or misbehaviour<sup>11</sup>. The validity of the Commission's proceedings is not affected by a defect in the appointment of a member<sup>12</sup>.

The Secretary of State must appoint a Chairman of the Commission, and may appoint one or more deputy chairmen, from among the reporting panel members<sup>13</sup>.

The Commission has a board known as the Competition Commission Council<sup>14</sup> through which certain of its functions must be exercised<sup>15</sup>. The council may determine its own procedure including, in particular, its quorum<sup>16</sup>. The Chairman, and any person acting as Chairman, has a casting vote on any question being decided by the council<sup>17</sup>.

The Secretary of State must pay to the Commission such sums as he considers appropriate to enable it to perform its functions<sup>18</sup>. Provision is made for the payment of such salaries and other remuneration, and pensions, allowances, fees, expenses or gratuities, to members of the Commission, as the Secretary of State may determine<sup>19</sup>. The Commission has a secretary, appointed by the Secretary of State<sup>20</sup>, and may appoint such staff as it thinks appropriate<sup>21</sup>. The Commission must keep proper accounts and records<sup>22</sup> and must make an annual report to the Secretary of State<sup>23</sup>.

The Commission is not to be regarded as the servant or agent of the Crown or as enjoying any status, privilege or immunity of the Crown<sup>24</sup> and its property is not to be regarded as property of, or held on behalf of, the Crown<sup>25</sup>.

In general, the Commission has power to do anything (except borrow money) calculated to facilitate, or incidental or conducive to, the discharge of its functions<sup>26</sup>. The Commission may publish advice and information in relation to any matter connected with the exercise of its functions<sup>27</sup>.

Members of the Commission are disqualified for membership of the House of Commons<sup>28</sup> and the Northern Ireland Assembly<sup>29</sup>.

<sup>1</sup> Competition Act 1998 s 45(1). The application of the Commission's seal must be authenticated by the signature of the secretary or of some other person authorised for the purpose, and a document purporting to be executed under that seal must be received in evidence and taken to be so executed unless the contrary is proved: see s 45(7), Sch 7 para 11.

2 Competition Act 1998 s 45(2).

3 Competition Act 1998 s 45(3). In any enactment, instrument or other document, any reference to the Monopolies and Mergers Commission which has continuing effect is to be read as a reference to the Competition Commission: s 45(4). 'Document' includes information recorded in any form; and 'information' includes estimates and forecasts: s 59(1). As to the power of the Secretary of State to make consequential, supplemental and incidental provision in connection with: (1) the dissolution of the Monopolies and Mergers Commission; and (2) the transfer of its functions, see s 45(5), (6); the Competition Act 1998 (Competition Commission) Transitional, Consequential and Supplemental Provisions Order 1999, SI 1999/506; the Competition Act 1998 (Transitional, Consequential and Supplemental Provisions) Order 2000, SI 2000/311; and the Competition Act 1998 (Consequential and Supplemental Provisions) Order 2000, SI 2000/2031. As to the Secretary of State see PARA 5.

4 Competition Act 1998 Sch 7 para 2(1)(b). Such members are known as 'reporting panel members': Sch 7 para 1. 'General functions' means any functions of the Commission other than functions which are to be discharged by the Council (see the text and note 15): Sch 7 para 1. As to the Commission's general functions see PARAS 10-11. As to the appointment of the reporting panel members on the establishment of the Commission see Sch 7 para 33.

5 See the Competition Act 1998 Sch 7 para 2(1)(c)-(e) (amended by the Utilities Act 2000 s 104(3); the Communications Act 2003 s 406(1), Sch 17 para 153; the Water Act 2003 s 101, Sch 7 para 32(1), Sch 9 Pt 3; and the Enterprise Act 2002 s 185, Sch 11 paras 1, 3(a), (b)). As to the maintenance of panels see the Competition Act 1998 Sch 7 para 22 (amended by the Enterprise Act 2002 Sch 11 paras 1, 12). Such members are known as 'specialist panel members': see the Competition Act 1998 Sch 7 para 1. As to the appointment of the specialist panel members on the establishment of the Commission see the Competition Act 1998 Sch 7 para 34.

6 See the Competition Act 1998 Sch 7 para 2(2), (3) (amended by the Enterprise Act 2002 ss 21, 278(2), Sch 5 paras 1, 7, Sch 11 paras 1, 3(d), (e)).

7 Competition Act 1998 Sch 7 para 2(1A) (added by the Enterprise Act 2002 Sch 11 paras 1, 3(c)).

8 Competition Act 1998 Sch 7 para 6(1).

9 Competition Act 1998 Sch 7 para 6(2) (amended by the Enterprise Act 2002 Sch 11 paras 1, 5(a)). This does not prevent a re-appointment for the purpose only of continuing to act as a member of a group of panel members selected by the Chairman under the Competition Act 1998 Sch 7 para 15 (see PARA 11): Sch 7 para 6(2) (as so amended).

10 Competition Act 1998 Sch 7 para 6(3).

11 Competition Act 1998 Sch 7 para 6(4).

12 Competition Act 1998 Sch 7 para 2(5).

13 See the Competition Act 1998 Sch 7 para 3(1), (2). The Chairman and any deputy chairman may resign office at any time by notice in writing to the Secretary of State: Sch 7 para 3(3). If the Chairman or a deputy chairman ceases to be a member he also ceases to be Chairman or deputy chairman: Sch 7 para 3(4). If the Chairman is absent or unable to act, provision is made for his functions to be performed by a deputy chairman, or if no deputy chairman has been designated so to act, by a member of the Commission designated by the Secretary of State or the Commission: see Sch 7 para 3(5). As to the appointment of the Chairman and deputy chairmen on the establishment of the Commission see Sch 7 paras 31, 32.

14 Competition Act 1998 Sch 7 para 5(1) (amended by the Enterprise Act 2002 ss 185, 278(2), Sch 11 paras 1, 4(a), Sch 26). The council consists of the Chairman of the Commission, any deputy chairmen, any members appointed by the Secretary of State under the Competition Act 1998 Sch 7 para 2(1)(e), such other members as the Secretary of State may appoint and the secretary: Sch 7 para 5(2) (amended by the Enterprise Act 2002 s 21, Sch 5 paras 1, 7(1), (5)(a), Sch 11 paras 1, 4(b), (c)). As to the secretary see the text and note 20. As to the membership of the council on the establishment of the Commission see the Competition Act 1998 Sch 7 para 36.

15 Competition Act 1998 Sch 7 para 5(3) (amended by the Enterprise Act 2002 Sch 5 paras 1, 7(1), 5(b), Sch 26). The functions referred to are those under the Competition Act 1998 Sch 7 paras 3, 7-12 (see the text and notes 1, 13, 18-22). Without prejudice to the question whether any other functions of the Commission are to be so discharged, the functions of the Commission under the Enterprise Act 2002 s 106 (see PARA 255), s 116 (see PARA 265), s 171 (see PARA 311) (and under s 116 as applied for the purposes of references under Pt 4 of

that Act by s 176 of that Act (see PARA 315)) are to be discharged by the Council: Competition Act 1998 Sch 7 para 5(3A) (added by the Enterprise Act 2002 Sch 11 paras 1, 4(d)).

16 Competition Act 1998 Sch 7 para 5(4).

17 Competition Act 1998 Sch 7 para 5(5).

18 Competition Act 1998 Sch 7 para 7(1).

19 Competition Act 1998 Sch 7 para 7(2). In certain circumstances, compensation (of such amount as the Secretary of State may determine) may be payable to a person who ceases to be a member otherwise than on the expiry of his term of office: see Sch 7 para 7(3).

20 See the Competition Act 1998 Sch 7 para 9(1). Before appointing a secretary, the Secretary of State must consult the Chairman: Sch 7 para 9(3) (amended by the Enterprise Act 2002 Sch 11 paras 1, 8(a), Sch 26). As to the appointment of the secretary on the establishment of the Commission see the Competition Act 1998 Sch 7 para 35.

21 Competition Act 1998 Sch 7 para 9(4) (amended by the Enterprise Act 2002 Sch 11 paras 1, 8(b)). The approval of the Secretary of State (as to numbers and terms and conditions of service) is required in relation to such appointments: Competition Act 1998 Sch 7 para 9(4) (as so amended).

22 See the Competition Act 1998 Sch 7 para 12.

23 See the Competition Act 1998 Sch 7 para 12A(1) (Sch 7 para 12A added by the Enterprise Act 2002 s 186). The annual report must be made before the end of August next following the financial year to which it relates: Competition Act 1998 Sch 7 para 12A(2) (as so added). The Secretary of State must lay a copy of the annual report before Parliament and arrange for the report to be published: Sch 7 para 12A(3) (as so added).

24 Competition Act 1998 Sch 7 para 13(1).

25 Competition Act 1998 Sch 7 para 13(2).

26 See the Competition Act 1998 Sch 7 para 8 (which is expressed, however, to be subject to the other provisions of Sch 7).

27 Competition Act 1998 Sch 7 para 7A (added by the Enterprise Act 2002 Sch 11 paras 1, 7).

28 See the House of Commons Disqualification Act 1975 Sch 1 Pt II (amended by the Competition Act 1998 Sch 7 para 28).

29 See the Northern Ireland Assembly Disqualification Act 1975 Sch 1 Pt 2 (amended by the Competition Act 1998 Sch 7 para 29).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1.  
INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(iii) The Competition Commission/10.  
The Commission's principal functions.

## **10. The Commission's principal functions.**

The Competition Commission investigates and addresses issues of concern that are referred to it by the Office of Fair Trading<sup>1</sup>, one of the sectoral regulators<sup>2</sup> or the Secretary of State<sup>3</sup>. There are three areas of concern:

- (1) in mergers, where the turnover of the business to be acquired is in excess of £70 million or where the share of supply reached will be more than 25 per cent and where a merger appears likely to lead to a substantial lessening of competition in one or more markets in the United Kingdom<sup>4</sup>;
- (2) in markets, when it appears that competition may be being prevented, distorted or restricted<sup>5</sup>; and

(3) in regulated sectors, where aspects of the regulatory system may not be operating effectively or to address certain categories of dispute between regulators and regulated companies<sup>6</sup>.

The Competition Commission also deals with energy code modification appeals<sup>7</sup>, price control appeals<sup>8</sup> and water determinations<sup>9</sup>.

- 1 As to the Office of Fair Trading see PARAS 6-8.
- 2 As to the sectoral regulators see PARAS 18-22.
- 3 As to the Secretary of State see PARA 5. The Competition Act 1980 gives the Secretary of State power to make references to the Competition Commission in respect of public bodies and certain other persons (see ss 11, 11A-11D, 12, 16, 17, 19). However, this power has not been exercised for a number of years.
- 4 See the Enterprise Act 2002 Pt 3 (ss 22-130); and PARA 172 et seq.
- 5 See the Enterprise Act 2002 Pt 4 (ss 131-184); and PARA 276 et seq.
- 6 See the Enterprise Act 2002 Pt 8 (ss 210-236); and PARA 339 et seq.
- 7 Ie under the Energy Act 2004 s 173 (see **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 733).
- 8 Ie under the Communications Act 2003 s 193 (see **TELECOMMUNICATIONS** vol 97 (2010) PARA 220).
- 9 Ie under the Water Industry Act 1991 s 12(3)(a) (see **WATER AND WATERWAYS** vol 100 (2009) PARA 142).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(iii) The Competition Commission/11. Performance of the Commission's general functions.

## **11. Performance of the Commission's general functions.**

When performing its general functions<sup>1</sup> the Competition Commission must do so through a group selected for the purpose by the Chairman<sup>2</sup> except where he is empowered to act on his own<sup>3</sup>. A group must consist of at least three persons, one of whom may be the Chairman<sup>4</sup>. Those persons must generally be reporting panel members or specialist panel members<sup>5</sup>. In selecting the members of the group, the Chairman must comply with any requirement as to its constitution imposed by any enactment applying to specialist panel members<sup>6</sup>. The Chairman must appoint one of the members of a group to act as the chairman of the group<sup>7</sup>.

If, during the proceedings of a group:

- (1) a member of the group ceases to be a member of the Commission;
- (2) the Chairman is satisfied that a member of the group will be unable for a substantial period to perform his duties as such; or
- (3) it appears to the Chairman that because of a particular interest of a member of the group it is inappropriate for him to remain in the group,

the Chairman may appoint a replacement<sup>8</sup>.

Reporting panel members of the Commission may be invited to attend or otherwise take part in meetings of the group<sup>9</sup>.

Subject to any special or general directions given by the Secretary of State<sup>10</sup>, each group may determine its own procedure<sup>11</sup>. The Chairman must make rules of procedure in relation to mergers and market references<sup>12</sup>.

Apart from certain specified purposes<sup>13</sup>, anything done by or in relation to a group in, or in connection with, the performance of functions to be performed by the group is to have the same effect as if done by or in relation to the Commission<sup>14</sup>.

The chairman of a group has a casting vote on any question to be decided by the group<sup>15</sup>.

1 As to the meaning of 'general functions' see PARA 9 note 4. Power is given to the Secretary of State to make modifications to the Competition Act 1998 s 45(7), Sch 7 Pt II for the purpose of improving the performance by the Commission of its functions: Competition Act 1998 s 45(8) (added by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (35)). As to the Secretary of State see PARA 5.

2 As to the Chairman of the Competition Commission see PARA 9.

3 Competition Act 1998 Sch 7 paras 14, 15(1) (amended by the Enterprise Act 2002 s 185, Sch 11 paras 1, 10(1), (2)). While a group is being constituted to perform a particular general function of the Commission, the Chairman may take such steps (falling within that general function) as he considers appropriate to facilitate the work of the group when it has been constituted: Competition Act 1998 Sch 7 para 15(7) (amended by the Enterprise Act 2002 ss 185, 287(2), Sch 11 paras 1, 10(1), (4), Sch 26). The Chairman may exercise the power conferred by the Enterprise Act 2002 s 37(1) (see PARA 185), s 48(1) (see PARA 196) or s 64(1) (see PARA 210) while a group is being constituted to perform a relevant general function of the Commission or, when it has been so constituted, before it has held its first meeting: Competition Act 1998 Sch 7 para 15(8) (added by the Enterprise Act 2002 Sch 11 paras 1, 10(1), (5)).

4 Competition Act 1998 Sch 7 para 15(2).

5 Competition Act 1998 Sch 7 para 15(6), which is expressed to be subject to Sch 7 para 15(2)-(5). As to the meanings of 'reporting panel member' and 'specialist panel member' see PARA 9 notes 4,5.

6 Competition Act 1998 Sch 7 para 15(3).

7 Competition Act 1998 Sch 7 para 16.

8 Competition Act 1998 Sch 7 para 17(1). The Chairman may also at any time appoint any reporting panel member to be an additional member of the group: Sch 7 para 17(2).

9 See the Competition Act 1998 Sch 7 para 18(1). Such a person may not vote, nor have a statement of his dissent included in a report of the group: Sch 7 para 18(2). A group, or a member of a group, is also entitled to consult any member of the Commission with respect to any matter or question with which the group is concerned: Sch 7 para 18(3).

10 No directions have been given under this provision by the Secretary of State; however the Chairman of the Commission publishes Guidance for certain groups on the procedures to be adopted: see PARA 12.

11 Competition Act 1998 Sch 7 para 19(1). In particular, each group may determine: (1) its own quorum; (2) the extent to which persons claiming to be interested in the subject matter of the reference may be present or heard (by themselves or by their representatives), may cross-examine witnesses, or otherwise take part; (3) the extent to which meetings of the group are to be held in public: Sch 7 para 19(2).

Before determining its procedure, the group must have regard to any guidance issued by the Chairman: Sch 7 para 19(3). Before issuing such guidance the Chairman must consult the members of the Commission: Sch 7 para 19(4).

12 See the Competition Act 1998 Sch 7 para 19(5) (added by the Enterprise Act 2002 s 187(2)). As to the rules of procedure see PARA 12.

13 For the purposes of the Enterprise Act 2002 Pt 3 (ss 22-130) (mergers) (see PARA 172 et seq) any decision of a group under s 35(1) or s 36(1) (questions to be decided on non-public interest merger references: see PARA 184) that there is an anti-competitive outcome is to be treated as a decision under that provision that there is not an anti-competitive outcome if the decision is not that of at least two-thirds of the members of the group: Competition Act 1998 Sch 7 para 20(2) (Sch 7 para 20(2) substituted, and Sch 7 para 20(3)-(8) added, by the Enterprise Act 2002 Sch 11 paras 1, 11(1), (3)). For the purposes of the Enterprise Act 2002 Pt 3, if the decision is not that of at least two-thirds of the members of the group: (1) any decision of a group under s 47

(questions to be decided on public interest merger references: see PARA 195) that a relevant merger situation has been created is to be treated as a decision under that provision that no such situation has been created; (2) any decision of a group under s 47 that the creation of a relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services is to be treated as a decision under that provision that the creation of that situation has not resulted, or may be expected not to result, in such a substantial lessening of competition; (3) any decision of a group under s 47 that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation is to be treated as a decision under that provision that no such arrangements are in progress or in contemplation; and (4) any decision of a group under s 47 that the creation of such a situation as is mentioned in head (3) may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services is to be treated as a decision under that provision that the creation of that situation may be expected not to result in such a substantial lessening of competition: Competition Act 1998 Sch 7 para 20(3) (as so added). As to the meaning of 'United Kingdom' see PARA 401 note 1.

For the purposes of the Enterprise Act 2002 Pt 3, if the decision is not that of at least two-thirds of the members of the group: (a) any decision of a group under s 63 (questions to be decided on special public interest merger references: see PARA 209) that a special merger situation has been created is to be treated as a decision under that provision that no such situation has been created; and (b) any decision of a group under s 63 that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation is to be treated as a decision under that provision that no such arrangements are in progress or in contemplation: Competition Act 1998 Sch 7 para 20(4) (as so added).

For the purposes of the Enterprise Act 2002 Pt 4 (ss 131-184) (market investigations), if the decision is not that of at least two-thirds of the members of the group, any decision of a group under s 134 or s 141 (questions to be decided on market investigation references: see PARAS 279, 285) that a feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom is to be treated as a decision that the feature or (as the case may be) combination of features does not prevent, restrict or distort such competition: Competition Act 1998 Sch 7 para 20(5) (as so added). Accordingly, for the purposes of the Enterprise Act 2002 Pt 4, a group is to be treated as having decided under s 134 or s 141 that there is no adverse effect on competition if one or more than one decision of the group is to be treated as mentioned in the Competition Act 1998 Sch 7 para 20(5) and there is no other relevant decision of the group: Sch 7 para 20(6) (as so added). 'Relevant decision' means a decision which is not to be treated as mentioned in Sch 7 para 20(5) and which is that a feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom: Sch 7 para 20(7) (as so added).

Expressions used in Sch 7 para 20(2)-(7) are to be construed in accordance with the Enterprise Act 2002 Pt 3 or Pt 4, as the case may be: Competition Act 1998 Sch 7 para 20(8) (as so added).

14 Competition Act 1998 Sch 7 para 20(1) (amended by the Enterprise Act 2002 Sch 11 paras 1, 11(1), (2)), which is expressed to be subject to specific provision made by or under other enactments about decisions which are not decisions of at least two-thirds of the members of a group (see the Competition Act 1998 Sch 7 para 20(9) (added by the Enterprise Act 2002 Sch 11 paras 1, 11(1), (3))).

15 Competition Act 1998 Sch 7 para 21.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1.  
INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(iii) The Competition Commission/12.  
Procedural rules for mergers and market references.

## **12. Procedural rules for mergers and market references.**

The Chairman<sup>1</sup> of the Competition Commission must make rules of procedure in relation to merger reference groups<sup>2</sup>, market reference groups<sup>3</sup> and special reference groups<sup>4</sup>. The Chairman must publish the rules in such manner as he considers appropriate for the purpose of bringing them to the attention of those likely to be affected by them<sup>5</sup>. The Chairman must consult the members of the Commission and such other persons as he considers appropriate before making any rules<sup>6</sup>. Rules may make different provision for different cases or different purposes and be varied or revoked by subsequent rules<sup>7</sup>. Subject to any rules made, each

merger reference group, market reference group and special reference group may determine its own procedure<sup>8</sup>. In determining how to proceed in accordance with any rules made and in determining its procedure, a group must have regard to any guidance issued by the Chairman<sup>9</sup>. Before issuing any guidance the Chairman must consult the members of the Commission and such other persons as he considers appropriate<sup>10</sup>.

Procedural rules may make provision:

- (1) for particular stages of a merger investigation<sup>11</sup>, a market investigation<sup>12</sup> or a special investigation<sup>13</sup> to be dealt with in accordance with a timetable and for the revision of that timetable<sup>14</sup>;
- (2) as to the documents and information which must be given to a relevant group in connection with a merger investigation, a market investigation or a special investigation<sup>15</sup>;
- (3) as to the documents or information which a relevant group<sup>16</sup> must give to other persons in connection with such an investigation<sup>17</sup>.

Rules may also make provision:

- (a) as to the quorum of relevant groups<sup>18</sup>;
- (b) as to the extent, if any, to which persons interested or claiming to be interested in a matter under consideration which is specified or described in the rules are allowed: (i) to be (either by themselves or by their representatives) present before a relevant group or heard by that group; (ii) to cross-examine witnesses; or (iii) otherwise to take part<sup>19</sup>;
- (c) as to the extent, if any, to which sittings of a relevant group are to be held in public<sup>20</sup>;
- (d) generally in connection with any matters permitted by rules made under head (b) or head (c) (including, in particular, provision for a record of any hearings)<sup>21</sup>;
- (e) for the notification or publication of information in relation to merger investigations, market investigations or special investigations<sup>22</sup>; and
- (f) as to consultation about such investigations<sup>23</sup>.

1 As to the Chairman see PARA 9. Further provision about rules is made by the Competition Act 1998 s 45(7), Sch 7A but is not to be taken as restricting the Chairman's powers under Sch 7 para 19A: Sch 7 para 19A(2) (Sch 7 para 19A, Sch 7A added by the Enterprise Act 2002 s 187(3), (4), Sch 12).

2 'Merger reference group' means any group constituted in connection with a reference under the Water Industry Act 1991 s 32 (see **WATER AND WATERWAYS** vol 100 (2009) PARA 150) or the Enterprise Act 2002 s 22 (see PARA 172), s 33 (see PARA 182), s 45 (see PARA 193) or s 62 (see PARA 208): Competition Act 1998 Sch 7 para 19A(9), Sch 7A para 1 (as added (see note 1); definition amended by the Communications Act 2003 s 406(7), Sch 19(1)).

3 'Market reference group' means any group constituted in connection with a reference under the Enterprise Act 2002 s 131 (see PARA 276) or s 132 (see PARA 277) (including that provision as it has effect by virtue of another enactment): Competition Act 1998 Sch 7 para 19A(9), Sch 7A para 1 (as added: see note 1).

4 Competition Act 1998 Sch 7 para 19A(1) (as added: see note 1). 'Special reference group' means any group constituted in connection with a reference or (in the case of the Financial Services and Markets Act 2000) an investigation under the Competition Act 1980 s 11 (see PARA 10); the Airports Act 1986 s 43 (see **AIR LAW** vol 2 (2008) PARAS 237-242); the Gas Act 1986 s 24 or s 41E (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 813, 821); the Electricity Act 1989 s 12 or s 56C (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 1081, 1089); the Water Industry Act 1991 s 12, s 14 or s 17K (see **WATER AND WATERWAYS** vol 100 (2009) PARAS 142, 144, 158); the Electricity (Northern Ireland) Order 1992, SI 1992/231 (NI 1), art 15; the Railways Act 1993 s 13 or Schedule 4A (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 88, 171 et seq); the Airports (Northern Ireland) Order 1994, SI 1994/426 (NI 1), art 34; the Gas (Northern Ireland) Order 1996, SI 1996/275 (NI 2), art 15; the Postal Services Act 2000 s 15 (see **POST OFFICE** vol 36(2) (Reissue) PARA 80; the Financial Services and Markets Act 2000 s 162 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48



(2008) PARA 40) or s 306 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 732); the Transport Act 2000 s 12 (see **AIR LAW** vol 2 (2008) PARA 146); the Communications Act 2003 s 193 (see **TELECOMMUNICATIONS** vol 97 (2010) PARA 220); or the Water Services etc (Scotland) Act 2005 (Consequential Provisions and Modifications) Order 2005 art 3: Competition Act 1998 Sch 7 para 19A(9), Sch 7A para 1 (as added (see note 1); definition amended by the Communications Act 2003 Sch 17 para 153(1), (3), Sch 19(1); the Water Act 2003 s 101(1), Sch 8 para 54; SI 2005/3172).

5 Competition Act 1998 Sch 7 para 19A(3) (as added: see note 1). See eg *Competition Commission Rules of Procedure* CC1 (2006).

6 Competition Act 1998 Sch 7 para 19A(4) (as added: see note 1).

7 Competition Act 1998 Sch 7 para 19A(5) (as added: see note 1).

8 Competition Act 1998 Sch 7 para 19A(6) (as added: see note 1).

9 Competition Act 1998 Sch 7 para 19A(7) (as added: see note 1). See eg *Chairman's Guidance to Groups* CC6 (March 2006).

10 Competition Act 1998 Sch 7 para 19A(8) (as added: see note 1).

11 'Merger investigation' means an investigation carried out by a merger reference group in connection with a reference under the Water Industry Act 1991 s 32 (see **WATER AND WATERWAYS** vol 100 (2009) PARA 150) or the Enterprise Act 2002 s 22, s 33, s 45 or s 62 (see PARAS 172, 182, 193, 208): Competition Act 1998 Sch 7A para 1 (as added: see note 1).

12 'Market investigation' means an investigation carried out by a market reference group in connection with a reference under the Enterprise Act 2002 s 131 or s 132 (see PARAS 276, 277) (including that provision as it has effect by virtue of another enactment): Competition Act 1998 Sch 7A para 1 (as added (see note 1); definition amended by the Communications Act 2003 Sch 19(1)).

13 'Special investigation' means an investigation carried out by a special reference group in connection with a reference under a provision mentioned in any of the enactments contained in the definition of 'special reference group' (see note 4): see the Competition Act 1998 Sch 7A para 1 (as added (see note 1); definition amended by SI 2005/3172).

14 Competition Act 1998 Sch 7A para 2(a) (as added: see note 1). Rules made by virtue of Sch 7A para 2(a), (b) may, in particular, enable or require a relevant group (see note 16) to disregard documents or information given after a particular date: Sch 7A para 3 (as added: see note 1).

15 Competition Act 1998 Sch 7A para 2(b) (as added: see note 1). See note 14.

16 'Relevant group' means a market reference group, merger reference group or special reference group: Competition Act 1998 Sch 7A para 1 (as added: see note 1).

17 Competition Act 1998 Sch 7A para 2(c) (as added: see note 1). Rules made by virtue of Sch 7A para 2(c) may, in particular, make provision for the notification or publication of, and for consultation about, provisional findings of a relevant group: Sch 7A para 4 (as added: see note 1).

18 Competition Act 1998 Sch 7A para 5 (as added: see note 1).

19 Competition Act 1998 Sch 7A para 6(a) (as added: see note 1).

20 Competition Act 1998 Sch 7A para 6(b) (as added: see note 1).

21 Competition Act 1998 Sch 7A para 6(c) (as added: see note 1).

22 Competition Act 1998 Sch 7A para 7(a) (as added: see note 1).

23 Competition Act 1998 Sch 7A para 7(b) (as added: see note 1).

## UPDATE

### 12 Procedural rules for mergers and market references

NOTE 4--Competition Act 1980 s 11 amended: SI 2009/1941.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/ (iv) The Competition Appeal Tribunal/13. Establishment and constitution of the Competition Appeal Tribunal.

## **(iv) The Competition Appeal Tribunal**

### **13. Establishment and constitution of the Competition Appeal Tribunal.**

The Competition Appeal Tribunal hears appeals and other applications or claims involving competition or economic regulatory issues. It was established under the Enterprise Act 2002 on 1 April 2003<sup>1</sup>.

The Tribunal consists of a President<sup>2</sup> appointed by the Lord Chancellor to preside over the Tribunal, members appointed by the Lord Chancellor to form a panel of chairmen<sup>3</sup> and members appointed by the Secretary of State to form a panel of ordinary members<sup>4</sup>. The Tribunal also has a Registrar appointed by the Secretary of State<sup>5</sup>. The expenses of the Tribunal are paid by the Competition Service<sup>6</sup>.

The members appointed as President or as chairmen hold and vacate office in accordance with their terms of appointment<sup>7</sup>. However, a person may not be a chairman for more than eight years<sup>8</sup>. The President and the chairmen may resign their offices by notice in writing to the Lord Chancellor<sup>9</sup> and the Lord Chancellor may remove a person from office as President or chairman on the ground of incapacity or misbehaviour<sup>10</sup>. If the President is absent or otherwise unable to act the Lord Chancellor may appoint as acting President any person qualified for appointment as a chairman<sup>11</sup>.

Ordinary members also hold and vacate office in accordance with their terms of appointment<sup>12</sup>. A person may not be an ordinary member for more than 8 years<sup>13</sup>. An ordinary member may resign his office by notice in writing to the Secretary of State<sup>14</sup> and the Secretary of State may remove a person from office as an ordinary member on the ground of incapacity or misbehaviour<sup>15</sup>.

The Competition Service must pay to the President, the chairmen and the ordinary members such remuneration (whether by way of salaries or fees), and such allowances, as the Secretary of State may determine<sup>16</sup>. The Competition Service, if required to do so by the Secretary of State, must also pay such pension, allowances or gratuities as may be determined by the Secretary of State to or in respect of a person who holds or has held office as President, a chairman or an ordinary member, or make such payments as may be so determined towards provision for the payment of a pension, allowance or gratuities to or in respect of such a person<sup>17</sup>.

If, where any person ceases to hold office as President, a chairman or ordinary member, the Secretary of State determines that there are special circumstances which make it right that he should receive compensation, the Competition Service is required pay to him such amount by way of compensation as the Secretary of State may determine<sup>18</sup>.

Any staff, office accommodation or equipment required for the Tribunal must be provided by the Competition Service<sup>19</sup>.

The President must arrange such training for members of the Tribunal as he considers appropriate<sup>20</sup>.

Members of the Tribunal are disqualified for membership of the House of Commons<sup>21</sup> and the Northern Ireland Assembly<sup>22</sup>.

1 See the Enterprise Act 2002 s 12(1).

2 A person is not eligible for appointment as President unless: (1) he satisfies the judicial-appointment eligibility condition on a seven-year basis; (2) he is an advocate or solicitor in Scotland of at least seven years' standing; or (3) he is a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least seven years' standing, and he appears to the Lord Chancellor to have appropriate experience and knowledge of competition law and practice: Enterprise Act 2002 s 12(5), Sch 2 para 1(1) (amended by the Tribunals, Courts and Enforcement Act 2007 s 50, Sch 10 para 36(1), (2)). Before appointing an advocate or solicitor in Scotland, the Lord Chancellor must consult the Lord President of the Court of Session: Enterprise Act 2002 Sch 2 para 1(3). As to the judicial-appointment eligibility condition see the Tribunals, Courts and Enforcement Act 2007 ss 50-52; and **ADMINISTRATIVE LAW**. As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

3 A person is not eligible for appointment as a chairman unless: (1) he satisfies the judicial-appointment eligibility condition on a five-year basis; (2) he is an advocate or solicitor in Scotland of at least five years' standing; or (3) he is a member of the Bar of Northern Ireland or solicitor of the Supreme Court of Northern Ireland of at least five years' standing, and he appears to the Lord Chancellor to have appropriate experience and knowledge (either of competition law and practice or any other relevant law and practice): Enterprise Act 2002 Sch 2 para 1(2) (amended by the Tribunals, Courts and Enforcement Act 2007 Sch 10 para 36(1), (3)). In the Enterprise Act 2002 Sch 2, 'chairman' and 'ordinary member' mean respectively a member of the panel of chairmen, or a member of the panel of ordinary members, appointed under s 12: Sch 2 para 9.

4 Enterprise Act 2002 s 12(2). As to the Secretary of State see PARA 5.

5 Enterprise Act 2002 s 12(3). As to the Registrar see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 4.

6 Enterprise Act 2002 s 12(4). As to the Competition Service see PARA 14.

7 Enterprise Act 2002 Sch 2 para 2(1).

8 Enterprise Act 2002 Sch 2 para 2(2). This does not prevent a temporary re-appointment for the purpose of continuing to act as a member of the Tribunal as constituted for the purposes of any proceedings instituted before the end of his term of office: Sch 2 para 2(2).

9 Enterprise Act 2002 Sch 2 para 2(3).

10 Enterprise Act 2002 Sch 2 para 2(4). The Lord Chancellor may remove a person from office as President only with the concurrence of all of the following: (1) the Lord Chief Justice of England and Wales; (2) the Lord President of the Court of Session; (3) the Lord Chief Justice of Northern Ireland: Sch 2 para 2(5) (Sch 2 para 2(5)-(7) added by the Constitutional Reform Act 2005 s 15(1), Sch 4 paras 304, 306). The Lord Chancellor may remove a person from office as chairman only with the concurrence of the appropriate senior judge: Enterprise Act 2002 Sch 2 para 2(6) (as so added). The appropriate senior judge is the Lord Chief Justice of England and Wales, unless: (a) the person to be removed exercises functions wholly or mainly in Scotland, in which case it is the Lord President of the Court of Session; or (b) the person to be removed exercises functions wholly or mainly in Northern Ireland, in which case it is the Lord Chief Justice of Northern Ireland: Sch 2 para 2(7) (as so added).

11 Enterprise Act 2002 Sch 2 para 3.

12 Enterprise Act 2002 Sch 2 para 4(1).

13 Enterprise Act 2002 Sch 2 para 4(2). This does not prevent a temporary re-appointment for the purpose of continuing to act as a member of the Tribunal as constituted for the purposes of any proceedings instituted before the end of his term of office: Sch 2 para 4(2).

14 Enterprise Act 2002 Sch 2 para 4(3).

15 Enterprise Act 2002 Sch 2 para 4(4).

16 Enterprise Act 2002 Sch 2 para 5(1).

17 Enterprise Act 2002 Sch 2 para 5(2).

18 Enterprise Act 2002 Sch 2 para 6.

19 Enterprise Act 2002 Sch 2 para 7.

20 Enterprise Act 2002 Sch 2 para 8.

21 See the House of Commons Disqualification Act 1975 Sch 1 Pt II (amended by the Enterprise Act 2002 Sch 2 para 10).

22 See the Northern Ireland Assembly Disqualification Act 1975 Sch 1 Pt 2 (amended by the Enterprise Act 2002 Sch 2 para 11).

## **UPDATE**

### **13 Establishment and constitution of the Competition Appeal Tribunal**

NOTES 2, 3--Enterprise Act 2002 Sch 2 para 1(1), (2) further amended: Constitutional Reform Act 2005 Sch 11 para 5.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/ (iv) The Competition Appeal Tribunal/14. The Competition Service.

#### **14. The Competition Service.**

The Enterprise Act 2002 established a body corporate called the Competition Service<sup>1</sup>, the purpose of which is to fund, and provide the Competition Appeal Tribunal<sup>2</sup> with support services, including the provision of staff, accommodation and equipment and any other services which facilitate the carrying out by the Tribunal of its functions<sup>3</sup>. The activities of the Service are not carried out on behalf of the Crown, and its property is not to be regarded as held on behalf of the Crown<sup>4</sup>. The Secretary of State<sup>5</sup> is required to pay to the Service such sums as he considers appropriate to enable it to fund the activities of the Tribunal and to carry out its other activities<sup>6</sup>.

The Service consists of the President of the Competition Appeal Tribunal<sup>7</sup>, the Registrar of the Competition Appeal Tribunal<sup>8</sup> and one or more members appointed by the Secretary of State after consulting the President<sup>9</sup>. The members are required to choose one of their number to be chairman of the Service<sup>10</sup>. An appointed member holds and vacates office in accordance with the terms of his appointment and is eligible for re-appointment<sup>11</sup>.

The Service pays such travelling and other allowances to its members, and such remuneration to any appointed member, as may be determined by the Secretary of State<sup>12</sup>. If required to do so by the Secretary of State, the Service also pays such pension, allowances or gratuities as may be determined by the Secretary of State to or in respect of a person who holds or has held office as an appointed member or makes such payments as may be so determined towards provision for the payment of a pension, allowances or gratuities to or in respect of such a person<sup>13</sup>. If, where any person ceases to hold office as an appointed member, the Secretary of State determines that there are special circumstances which make it right that he should receive compensation, the Service must pay to him such amount by way of compensation as the Secretary of State may determine<sup>14</sup>.

The Service may, with the approval of the Secretary of State as to numbers and terms and conditions of service, appoint such staff as it may determine<sup>15</sup>.

The Service may regulate its own procedure, including quorum<sup>16</sup>. The validity of anything done by the Service is not affected by a vacancy among its members or by a defect in the appointment of a member<sup>17</sup>.

The application of the seal of the Service is authenticated by the signature of any member, or some other person who has been authorised for that purpose by the Service, whether generally or specially<sup>18</sup>. A document purporting to be duly executed under the seal of the Service, or signed on its behalf, must be received in evidence and, unless the contrary is proved, be taken to be so executed or signed<sup>19</sup>.

The Service is required to keep proper accounts and records in relation to its accounts and those of the Tribunal<sup>20</sup>.

Members of the Service are disqualified for membership of the House of Commons<sup>21</sup> and the Northern Ireland Assembly<sup>22</sup>.

1 See the Enterprise Act 2002 s 13(1).

2 As to the establishment and constitution of the Competition Appeal Tribunal see PARA 13.

3 Enterprise Act 2002 s 13(2), (3). The Service has power to do anything which is calculated to facilitate, or is conducive or incidental to, the performance of its functions: s 13(6), Sch 3 para 10. The Secretary of State may make one or more schemes for the transfer to the Service of defined property, rights and liabilities of the Competition Commission, including rights and liabilities relating to contracts of employment: see Sch 3 paras 13-16. As to the Competition Commission see PARA 9.

4 Enterprise Act 2002 s 13(4).

5 As to the Secretary of State see PARA 5.

6 Enterprise Act 2002 s 13(5).

7 As to the President see PARA 13.

8 As to the Registrar see PARA 13.

9 Enterprise Act 2002 Sch 3 para 1(1), (2).

10 Enterprise Act 2002 Sch 3 para 2(1). The first chairman of the Service was designated by the Secretary of State: see Sch 3 para 2(2).

11 Enterprise Act 2002 Sch 3 para 3.

12 Enterprise Act 2002 Sch 3 para 4(1).

13 Enterprise Act 2002 Sch 3 para 4(2).

14 Enterprise Act 2002 Sch 3 para 5.

15 Enterprise Act 2002 Sch 3 para 6(1). The persons to whom the Superannuation Act 1972 s 1 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 567) applies include the staff of the Service: Enterprise Act 2002 Sch 3 para 6(2). The Service must pay to the Minister for the Civil Service, at such times as he may direct, such sums as he may determine in respect of any increase attributable to Sch 3 para 6(2) in the sums payable out of money provided by Parliament under the Superannuation Act 1972: Enterprise Act 2002 Sch 3 para 6(3). As to the Minister for the Civil Service see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 550.

16 Enterprise Act 2002 Sch 3 para 7(1).

17 Enterprise Act 2002 Sch 3 para 7(2).

18 Enterprise Act 2002 Sch 3 para 8(1). This does not apply in relation to any document which is, or is to be, signed in accordance with the law of Scotland: Sch 3 para 8(2).

19 Enterprise Act 2002 Sch 3 para 9.

20 Enterprise Act 2002 Sch 3 para 11(1), 12. In performing that duty the Service, in addition to accounts and records relating to its own activities (including the services provided to the Tribunal), must keep separate accounts and separate records in relation to the activities of the Tribunal: Sch 3 para 11(2). The Service must prepare a statement of accounts in respect of each of its financial years and prepare a statement of accounts

for the Tribunal for each of its financial years: Sch 3 para 12(1). 'Financial year' means the period of 12 months ending with 31 March: Sch 3 para 12(5). The Service must send copies of the accounts to the Secretary of State and to the Comptroller and Auditor General before the end of August following the financial year to which they relate: Sch 3 para 12(2). As to the Comptroller and Auditor General see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 724. Those accounts must comply with any directions given by the Secretary of State with the approval of the Treasury as to: (1) the information to be contained in them; (2) the manner in which that information is to be presented; and (3) the methods and principles according to which they are to be prepared: Sch 3 para 12(3). The Comptroller and Auditor General must examine, certify and report on each statement of accounts received by him and lay copies of each statement before Parliament: Sch 3 para 12(4).

21 See the House of Commons Disqualification Act 1975 Sch 1 Pt II (amended by the Enterprise Act 2002 Sch 3 para 17).

22 See the Northern Ireland Assembly Disqualification Act 1975 Sch 1 Pt 2 (amended by the Enterprise Act 2002 Sch 3 para 18).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/ (iv) The Competition Appeal Tribunal/15. Procedure of the Competition Appeal Tribunal.

## **15. Procedure of the Competition Appeal Tribunal.**

For the purposes of any proceedings before it the Competition Appeal Tribunal consists of a chairman and two other members<sup>1</sup>. The chairman must be the President or a member of the panel of chairmen<sup>2</sup>. The other members may be chosen from either the panel of chairmen or the panel of ordinary members<sup>3</sup>. If the members of the Tribunal as so constituted are unable to agree on any decision, the decision is to be taken by majority vote<sup>4</sup>.

A decision of the Tribunal in any proceedings before it must state the reasons for the decision and whether it was unanimous or taken by a majority<sup>5</sup>. The decision must be recorded in a document signed and dated by the chairman of the Tribunal dealing with the proceedings<sup>6</sup>.

If a decision of the Tribunal is registered in England and Wales in accordance with rules of court or any practice direction, payment of damages or costs and expenses which are awarded by the decision and any direction given as a result of the decision, may be enforced by the High Court as if the damages, costs or expenses were an amount due in pursuance of a judgment or order of the High Court, or as if the direction were an order of the High Court<sup>7</sup>. Subject to rules of court or any practice direction, a decision of the Tribunal may be registered or recorded for execution (1) for the purpose of enforcing a direction given as a result of the decision, by the Registrar of the Tribunal or a person who was a party to the proceedings; (2) for the purpose of enforcing a decision to award damages, costs or expenses (other than a decision to which head (3) applies), by the person to whom the sum concerned was awarded; and (3) for the purpose of enforcing a decision to award damages which is the subject of an order under the statutory provision relating to claims brought on behalf of consumers<sup>8</sup>, by the specified body concerned<sup>9</sup>.

1 Enterprise Act 2002 s 14(1). As to the constitution of the Competition Appeal Tribunal see PARA 13. The provisions of s 14 have effect subject to s 14(6), Sch 4 para 18 (consequences of a member of the Tribunal being unable to continue after the proceedings have begun to be heard) (see PARA 16): s 14(5).

2 Enterprise Act 2002 s 14(2). As to the President and the panel of chairmen see PARA 13.

3 Enterprise Act 2002 s 14(3).

4 Enterprise Act 2002 s 14(4).

5 Enterprise Act 2002 Sch 4 para 1(1)(a).

6 Enterprise Act 2002 Sch 4 para 1(1)(b). In preparing the document the Tribunal must have regard to the need for excluding, so far as practicable: (1) information the disclosure of which would in its opinion be contrary to the public interest; (2) commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business interests of the undertaking to which it relates; (3) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests: Sch 4 para 1(2). The Tribunal must also have regard to the extent to which any such disclosure is necessary for the purpose of explaining the reasons for the decision: Sch 4 para 1(3). The President must make such arrangements for the publication of the decisions of the Tribunal as he considers appropriate: Sch 4 para 1(4).

7 Enterprise Act 2002 Sch 4 para 2. If a decision of the Tribunal awards damages, costs or expenses, or results in any direction being given, the decision may be recorded for execution in the Books of Council and Session and is enforceable accordingly: Sch 4 para 3. As to the enforcement of decisions in Northern Ireland see Sch 4 para 5.

8 In the Competition Act 1998 s 47B(6) (see PARA 169).

9 Enterprise Act 2002 Sch 4 para 4. A decision of the Tribunal in proceedings under the Competition Act 1998 s 47B (see PARA 169) which: (1) awards damages to an individual in respect of a claim made or continued on his behalf (but is not the subject of an order under s 47B(6)); or (2) awards costs or expenses to an individual in respect of proceedings in respect of a claim made under s 47A (see PARA 168) prior to its being continued on his behalf in the proceedings under s 47B, may only be enforced by the individual concerned with the permission of the High Court or Court of Session: Enterprise Act 2002 Sch 4 para 6. An award of costs or expenses against a specified body in proceedings under the Competition Act 1998 s 47B may not be enforced against any individual on whose behalf a claim was made or continued in those proceedings: Enterprise Act 2002 Sch 4 para 7. In Sch 4 Pt 1 (paras 1-8), any reference to damages includes a reference to any sum of money (other than costs or expenses) which may be awarded in respect of a claim made under the Competition Act 1998 s 47A or included in proceedings under s 47B: Enterprise Act 2002 Sch 4 para 8.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/ (iv) The Competition Appeal Tribunal/16. Competition Appeal Tribunal rules.

## **16. Competition Appeal Tribunal rules.**

The Secretary of State<sup>1</sup> may, after consulting the President<sup>2</sup> and such other persons as he considers appropriate, make Tribunal rules with respect to proceedings before the Competition Appeal Tribunal<sup>3</sup>. Tribunal rules may make provision with respect to matters incidental to or consequential upon appeals provided for by or under any Act to the Court of Appeal or the Court of Session in relation to a decision of the Tribunal<sup>4</sup>. Tribunal rules may specify qualifications for appointment as Registrar<sup>5</sup> and confer functions on the President or the Registrar in relation to proceedings before the Tribunal<sup>6</sup>. They may also contain incidental, supplemental, consequential or transitional provision<sup>7</sup>. The power to make Tribunal rules is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament<sup>8</sup>.

Tribunal rules may make different provision for different kinds of proceedings<sup>9</sup>. They may make provision as to the period within which and the manner in which proceedings are to be brought<sup>10</sup>. They may also provide for the Tribunal to reject any proceedings<sup>11</sup> if it considers that the person instituting them does not have a sufficient interest in the decision with respect to which the proceedings are brought, or the document by which he institutes them discloses no valid grounds for bringing them<sup>12</sup>. The rules may also provide for the Tribunal to reject any proceedings if it is satisfied that the person instituting the proceedings has habitually and persistently and without any reasonable ground instituted vexatious proceedings (whether against the same person or against different persons) or made vexatious applications in any proceedings<sup>13</sup>. Tribunal rules must ensure that no proceedings are rejected without giving the parties the opportunity to be heard<sup>14</sup>.

Tribunal rules may make provision for the carrying out by the Tribunal of a preliminary consideration of proceedings (a 'pre-hearing review'), which may include provision enabling such powers to be exercised on a pre-hearing review as may be specified in the rules and provision for security and supplemental provision relating to security<sup>15</sup>.

Tribunal rules may make provision:

- (1) as to the manner in which proceedings are to be conducted, including provision for any hearing to be held in private if the Tribunal considers it appropriate<sup>16</sup>;
- (2) as to the persons entitled to appear on behalf of the parties<sup>17</sup>;
- (3) for requiring persons to attend to give evidence and produce documents, and for authorising the administration of oaths to witnesses<sup>18</sup>;
- (4) as to the evidence which may be required or admitted and the extent to which it should be oral or written<sup>19</sup>;
- (5) allowing the Tribunal to fix time limits with respect to any aspect of proceedings and to extend any time limit (before or after its expiry)<sup>20</sup>;
- (6) enabling the Tribunal, on the application of any party or on its own initiative, to order the disclosure between, or the production by, the parties of documents or classes of documents<sup>21</sup>;
- (7) for the appointment of experts for the purposes of proceedings<sup>22</sup>;
- (8) for the award of costs or expenses, including allowances payable to persons in connection with attendance before the Tribunal<sup>23</sup>;
- (9) for taxing or otherwise settling any costs or expenses awarded by the Tribunal or for the enforcement of any order awarding costs or expenses<sup>24</sup>.

Tribunal rules may make provision as to the consequences of a member of the Tribunal being unable to continue after part of any proceedings have been heard<sup>25</sup> and may allow the Tribunal to consist of the remaining members for the rest of the proceedings<sup>26</sup>.

Tribunal rules may make provision allowing the Tribunal to order that interest is payable on any sum awarded by the Tribunal or on any fees<sup>27</sup> ordered to be paid<sup>28</sup>.

Tribunal rules may also make provision as to the withdrawal of proceedings<sup>29</sup>, interim orders<sup>30</sup>, where to sit for the purposes of proceedings<sup>31</sup>, in relation to persons not party to proceedings<sup>32</sup> and as to the transfer of certain claims<sup>33</sup>.

1 As to the Secretary of State see PARA 5.

2 As to the President of the Tribunal see PARA 13.

3 Enterprise Act 2002 s 15(1). As to the establishment and constitution of the Tribunal see PARA 13.

4 Enterprise Act 2002 s 15(2).

5 Enterprise Act 2002 s 15(3)(a). See the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 4. As to the Registrar see PARA 13.

6 Enterprise Act 2002 s 15(3)(b). See the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 62 (amended by SI 2004/2068). As to proceedings before the Tribunal see PARA 15.

7 Enterprise Act 2002 s 15(3)(c). As to the calculation of time see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 64; as to conditional fee arrangements see r 65; as to enforcement of orders see r 66; as to irregularities see r 67; and as to the general power of the Tribunal see r 68.

8 Enterprise Act 2002 s 15(4). In exercise of this power the Secretary of State has made the Competition Appeal Tribunal Rules 2003, SI 2003/1372, and the Competition Appeal Tribunal (Amendment and Communications Act Appeals) Rules 2004, SI 2004/2068. As to the power of the Tribunal under the rules see *Floe Telecom Ltd v Office of Communications* [2006] EWCA Civ 768, [2006] 4 All ER 688.



9 Enterprise Act 2002 s 15(5), Sch 4 para 10. See the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 3. As to proceedings under the Enterprise Act 2002 see rr 25-29. The provisions of the Enterprise Act 2002 Sch 4 Pt 2 (paras 9-26) (which makes further provision about the rules) has effect, but without prejudice to the generality of s 15(1) (see the text to notes 1-3): s 15(5). In Sch 4, the 'Tribunal', in relation to any proceedings before it, means the Tribunal as constituted (in accordance with s 14 (see PARA 15)) for the purposes of those proceedings: Sch 4 para 9.

10 Enterprise Act 2002 Sch 4 para 11(1). That provision may, in particular: (1) provide for time limits for making claims to which the Competition Act 1998 s 47A (see PARA 168) applies in proceedings under s 47A or s 47B (see PARA 169); (2) provide for the Tribunal to extend the period in which any particular proceedings may be brought; and (3) provide for the form, contents, amendment and acknowledgement of the documents by which proceedings are to be instituted: Enterprise Act 2002 Sch 4 para 11(2). As to the time and manner of commencing appeals see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, rr 8, 9, 13. As to defence see r 14. As to the service of documents on the Tribunal see r 5; and as to the service of documents on other persons see r 63 (amended by SI 2004/2068). As to the Tribunal website see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 6. As to the publication of a summary of an appeal see r 15. As to the delivery of the Tribunal's decision see r 54. As to consent orders see r 57. As to appeals from the Tribunal see rr 58, 59.

11 le other than proceedings under the Competition Act 1998 s 47A (see PARA 168) or s 47B (see PARA 169). See note 12.

12 Enterprise Act 2002 Sch 4 para 12. Tribunal rules may provide for the Tribunal: (1) to reject the whole of any proceedings under the Competition Act 1998 s 47B (see PARA 169) if it considers that the person bringing the proceedings is not entitled to do so or that the proceedings do not satisfy the requirements of s 47B(1); (2) to reject any claim which is included in proceedings under s 47B if it considers that the claim is not a consumer claim (within the meaning of s 47B(2)) which may be included in such proceedings, or the individual concerned has not consented to its being made or continued on his behalf in such proceedings; or (3) to reject any claim made under s 47A (see PARA 168) or included in proceedings under s 47B if it considers that there are no reasonable grounds for making it: Enterprise Act 2002 Sch 4 para 13. See the Competition Appeal Tribunal Rules 2003, SI 2003/1372, rr 9-11.

13 Enterprise Act 2002 Sch 4 para 14. As to vexatious proceedings see **CIVIL PROCEDURE** vol 11 (2009) PARAS 244-245.

14 Enterprise Act 2002 Sch 4 para 15.

15 Enterprise Act 2002 Sch 4 para 16(1), (2). 'Provision for security' means provision authorising the Tribunal, in specified circumstances, to order a party to the proceedings, if he wishes to continue to participate in them or to pay a deposit not exceeding such sum as may be specified or calculated in a specified manner: Sch 4 para 16(3)(a). 'Supplemental provision', in relation to security, means provision as to: (1) the manner in which the amount of a deposit is to be determined; (2) the consequences of non-payment of a deposit; (3) the circumstances in which the deposit, or any part of it, may be refunded to the person who paid it or paid to another party to the proceedings: Sch 4 para 16(3)(b).

16 Enterprise Act 2002 Sch 4 para 17(1)(a). The Tribunal may consider it appropriate for a hearing to be held in private because it is considering information the disclosure of which might be contrary to public interest or harm business or personal interests: see Sch 4 paras 1(2), 17(1)(a). As to case management see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, rr 19, 20, 21. As to the failure to comply with directions see r 24. As to the hearing see rr 50-52.

17 Enterprise Act 2002 Sch 4 para 17(1)(b). As to representation see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 7.

18 Enterprise Act 2002 Sch 4 para 17(1)(c). As to the summoning or citing of witnesses see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 23. A person who without reasonable excuse fails to comply with any requirement imposed by virtue of the Enterprise Act 2002 Sch 4 para 17(1)(c) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale: Sch 4 para 17(5)(a).

'Standard scale' means the standard scale of maximum fines for summary offences as set out in the Criminal Justice Act 1982 s 37: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 142. At the date at which this volume states the law, the standard scale is as follows: level 1, £200; level 2, £500; level 3, £1,000; level 4, £2,500; level 5, £5,000: Criminal Justice Act 1982 s 37(2) (substituted by the Criminal Justice Act 1991 s 17(1)). As to the determination of the amount of the fine actually imposed, as distinct from the level on the standard scale which it may not exceed, see the Criminal Justice Act 2003 s 164; and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 144.

19 Enterprise Act 2002 Sch 4 para 17(1)(d). As to evidence see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 22. As to requests for confidential treatment of documents see r 53.

20 Enterprise Act 2002 Sch 4 para 17(1)(e).

21 Enterprise Act 2002 Sch 4 para 17(1)(f). As to disclosure see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq. A person who without reasonable excuse fails to comply with any requirement with respect to the disclosure, production, recovery or inspection of documents which is imposed by virtue of Sch 4 para 17(1)(f) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale: Sch 4 para 17(5)(b).

22 Enterprise Act 2002 Sch 4 para 17(1)(g).

23 Enterprise Act 2002 Sch 4 para 17(1)(h). Rules under Sch 4 para 17(1)(h) may provide, in relation to a claim made under the Competition Act 1998 s 47A (see PARA 168) which is continued on behalf of an individual in proceedings under s 47B (see PARA 169), for costs or expenses to be awarded to or against that individual in respect of proceedings on that claim which took place before it was included in the proceedings under s 47B: Enterprise Act 2002 Sch 4 para 17(2). Otherwise Tribunal rules may not provide for costs or expenses to be awarded to or against an individual on whose behalf a claim is made or continued in proceedings under the Competition Act 1998 s 47B: Enterprise Act 2002 Sch 4 para 17(3). Tribunal rules may make provision enabling the Tribunal to refer any matter arising in any proceedings (other than proceedings under the Competition Act 1998 s 47A or s 47B) back to the authority that made the decision to which the proceedings relate, if it appears that the matter has not been adequately investigated: Enterprise Act 2002 Sch 4 para 17(4). As to claims for damages see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, Pt IV (rr 30-49) (r 43 amended by SI 2004/2068). As to the award of costs and interest see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, rr 55, 56 (r 55 amended by SI 2004/2068).

24 Enterprise Act 2002 Sch 4 para 17(1)(i). As to costs see **CIVIL PROCEDURE** vol 12 (2009) PARA 1729 et seq.

25 Enterprise Act 2002 Sch 4 para 18(1).

26 Enterprise Act 2002 Sch 4 para 18(2). The rules may enable the President, if it is the chairman of the Tribunal who is unable to continue: (1) to appoint either of the remaining members to chair the Tribunal; and (2) if that person is not a member of the panel of chairmen, to appoint himself or some other suitably qualified person to attend the proceedings and advise the remaining members on any questions of law arising: Sch 4 para 18(3). A person is 'suitably qualified' if he is, or is qualified for appointment as, a member of the panel of chairmen (see PARA 13): Sch 4 para 18(4).

27 Tribunal rules may provide: (1) for fees to be chargeable in respect of specified costs of proceedings; and (2) for the amount of such costs to be determined by the Tribunal: Sch 4 para 20(1). Any sums received in respect of such fees is to be paid into the Consolidated Fund: Sch 4 para 20(2). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711 et seq; **PARLIAMENT** vol 78 (2010) PARAS 1028-1031.

28 Enterprise Act 2002 Sch 4 para 19(1). That provision may include provision as to the circumstances in which such an order may be made and as to the manner in which, and the periods in respect of which, interest is to be calculated and paid: Sch 4 para 19(2).

29 See the Enterprise Act 2002 Sch 4 para 21. Tribunal rules may make provision: (1) preventing a party who has instituted proceedings from withdrawing them without the permission of the Tribunal or, in specified circumstances, the President or the Registrar; (2) for the Tribunal to grant permission to withdraw proceedings on such conditions as it considers appropriate; (3) enabling the Tribunal to publish any decision which it would have made in any proceedings, had the proceedings not been withdrawn; (4) as to the effect of withdrawal of proceedings; and (5) as to the procedure to be followed if parties to proceedings agree to settle: Sch 4 para 21(1). Tribunal rules may make, in relation to a claim included in proceedings under the Competition Act 1998 s 47B (see PARA 169), any provision which may be made under heads (1)-(3) in relation to the whole proceedings: Enterprise Act 2002 Sch 4 para 21(2). As to withdrawal of an appeal see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 12 (amended by SI 2004/2068).

30 See the Enterprise Act 2002 Sch 4 para 22. Tribunal rules may provide for the Tribunal to make an order, on an interim basis: (1) suspending the effect of any decision which is the subject matter of proceedings before it; (2) in the case of an appeal under the Competition Act 1998 s 46 or s 47 (see PARAS 166-167), varying the conditions or obligations attached to an exemption; (3) granting any remedy which the Tribunal would have had power to grant in its final decision: Enterprise Act 2002 Sch 4 para 22(1). Tribunal rules may also make provision giving the Tribunal powers similar to those given to the Office of Fair Trading by the Competition Act 1998 s 35 (see PARA 136): Enterprise Act 2002 Sch 4 para 22(2). As to interim orders see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 61.

31 See the Enterprise Act 2002 Sch 4 para 23(1). Tribunal rules may make provision enabling the Tribunal to decide that any proceedings before it are to be treated, for purposes connected with: (1) any appeal from a decision of the Tribunal made in those proceedings; and (2) any other matter connected with those proceedings, as proceedings in England and Wales, Scotland or Northern Ireland (regardless of the decision made as to where to sit for the purposes of Sch 4 para 23(1)): Sch 4 para 23(2). Tribunal rules may provide for each claim made or continued on behalf of an individual in proceedings under the Competition Act 1998 s 47B (see PARA 169) to be treated as separate proceedings: Enterprise Act 2002 Sch 4 para 23(3). As to the forum see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 18.

32 See the Enterprise Act 2002 Sch 4 para 24. Tribunal rules may make provision: (1) for a person who is not a party to be joined in any proceedings; (2) for hearing a person who is not a party where, in any proceedings, it is proposed to make an order or give a direction in relation to that person; (3) for proceedings to be consolidated on such terms as the Tribunal thinks appropriate in such circumstances as may be specified: Sch 4 para 24. As to permission to intervene in proceedings see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 16 (amended by SI 2004/2068). As to the consolidation of proceedings see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 17.

33 See the Enterprise Act 2002 Sch 4 paras 25, 26. Tribunal rules may make provision for the Tribunal to transfer a claim made in proceedings under the Competition Act 1998 s 47A (see PARA 168) to the High Court or a county court in England and Wales or Northern Ireland or the Court of Session or a sheriff court in Scotland: Enterprise Act 2002 Sch 4 para 25. Tribunal rules may make provision in connection with the transfer of any proceedings from such a court to the Tribunal under s 16 (see PARA 17): Sch 4 para 26. As to references to the European Court see the Competition Appeal Tribunal Rules 2003, SI 2003/1372, r 60.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1.  
INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/ (iv) The Competition Appeal Tribunal/17.  
Transfer of certain proceedings to and from the Competition Appeal Tribunal.

## **17. Transfer of certain proceedings to and from the Competition Appeal Tribunal.**

The Lord Chancellor<sup>1</sup> may by regulations make provision enabling the court<sup>2</sup> to transfer to the Competition Appeal Tribunal for its determination so much of any proceedings before the court as relates to an infringement issue<sup>3</sup>, and to give effect to the determination of that issue by the Tribunal<sup>4</sup>. Regulations may also make such incidental, supplementary, consequential, transitional or saving provision as the Lord Chancellor may consider appropriate<sup>5</sup>. The power to make such regulations is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament<sup>6</sup>. Rules of court may prescribe the procedure to be followed in connection with a transfer to the Tribunal<sup>7</sup>.

1 As to the Lord Chancellor see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 477 et seq.

2 'Court' means: (1) the High Court or a county court; or (2) the Court of Session or a sheriff court: Enterprise Act 2002 s 16(6).

3 'Infringement issue' means any question relating to whether or not an infringement of: (1) the Chapter I prohibition (see PARA 116) or the Chapter II prohibition (see PARA 125); or (2) the EC Treaty art 81 or art 82 (see PARAS 4, 24 et seq), has been or is being committed: Enterprise Act 2002 s 16(6). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

4 Enterprise Act 2002 s 16(1)(a).

5 Enterprise Act 2002 s 16(1)(b).

6 Enterprise Act 2002 s 16(2). See the Act of Sederunt (Ordinary Cause Rules) Amendment (Competition Appeal Tribunal) 2004, SSI 2004/350.

7 Enterprise Act 2002 s 16(3). The court may transfer to the Tribunal, in accordance with rules of court, so much of any proceedings before it as relates to a claim to which the Competition Act 1998 s 47A applies (see PARA 168): Enterprise Act 2002 s 16(4). Rules of court may make provision in connection with the transfer from the Tribunal to the High Court or the Court of Session of a claim made in proceedings under the Competition Act 1998 s 47A: Enterprise Act 2002 s 16(5). See CPR *Practice Direction-Transfer* PD30 para 8.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(v) The Sectoral Regulators/18. Role of sectoral regulators.

## **(v) The Sectoral Regulators**

### **18. Role of sectoral regulators.**

As a result of the demonopolisation and privatisation of industries, in particular the utilities industries, various competition issues arose. Firstly, immediately following demonopolisation, the lack of competition could result in excessive charges being levied and potential competitors being prevented from entering the market. Second, it was important to ensure that adequate services were provided. Third, in some industries a 'universal service obligation' was imposed, for example to maintain a water supply to premises. To deal with these issues, in the United Kingdom detailed regulatory regimes were established for the privatised industries, namely telecommunications, gas, electricity, water and rail transport. The regulators are the Office of Communications<sup>1</sup>, the Gas and Electricity Markets Authority<sup>2</sup>, the Water Services Regulation Authority<sup>3</sup> and the Office of Rail Regulation<sup>4</sup>.

1 As to the Office of Communications see PARA 19.

2 As to the Gas and Electricity Markets Authority see PARA 20.

3 As to the Water Services Regulation Authority see PARA 21.

4 As to the Office of Rail Regulation see PARA 22.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(v) The Sectoral Regulators/19. Office of Communications.

### **19. Office of Communications.**

The Office of Communications ('OFCOM') was established by the Office of Communications Act 2002<sup>1</sup>. It is the principal duty of OFCOM, in carrying out its functions: (1) to further the interests of citizens in relation to communications matters; and (2) to further the interests of consumers in relevant markets, where appropriate by promoting competition<sup>2</sup>. OFCOM also has the duty to ensure: (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum; (b) the availability throughout the United Kingdom of a wide range of electronic communications services; (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests; (d) the maintenance of a sufficient plurality of providers of different television and radio services; (e) the application, in the case of all television and radio

services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services; (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both unfair treatment in programmes included in such services and unwarranted infringements of privacy resulting from activities carried on for the purposes of such services<sup>3</sup>.

- 1 See the Office of Communications Act 2002 s 1(1); and **TELECOMMUNICATIONS** vol 97 (2010) PARA 1 et seq.
- 2 See the Communications Act 2003 s 3(1); **TELECOMMUNICATIONS** vol 97 (2010) PARA 16.
- 3 See the Communications Act 2003 s 3(2); **TELECOMMUNICATIONS** vol 97 (2010) PARA 16.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(v) The Sectoral Regulators/20. Gas and Electricity Markets Authority.

## **20. Gas and Electricity Markets Authority.**

The Gas and Electricity Markets Authority was established by the Utilities Act 2000<sup>1</sup>. The Authority's principal objective when carrying out certain of its functions is to protect the interests of existing and future consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the shipping, transportation or supply of gas conveyed through pipes, and the generation, transmission, distribution or supply of electricity or the provision or use of electricity interconnectors<sup>2</sup>.

The Authority has powers under the Competition Act 1998 to investigate suspected anti-competitive activity<sup>3</sup>.

- 1 See the Utilities Act 2000 s 1; and **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 708.
- 2 See **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 708 et seq.
- 3 See the Competition Act 1998 s 54, Sch 10; and PARA 147.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(v) The Sectoral Regulators/21. Water Services Regulation Authority.

## **21. Water Services Regulation Authority.**

The Water Services Regulation Authority ('Ofwat') was established by the Water Act 2003<sup>1</sup> and regulates the regional monopoly water companies. The functions of Ofwat are: (1) to protect the interests of consumers, wherever appropriate by promoting effective competition between persons engaged in, or in commercial activities connected with, the provision of water and sewerage services; (2) to secure that the functions of a water undertaker and of a sewerage undertaker are properly carried out as respects every area of England and Wales; (3) to secure

that companies holding appointments as relevant undertakers are able (in particular, by securing reasonable returns on their capital) to finance the proper carrying out of those functions; and (4) to secure that the activities authorised by the licence of a licensed water supplier and any statutory functions imposed on it in consequence of the licence are properly carried out<sup>2</sup>.

Ofwat has powers under the Competition Act 1998 to investigate suspected anti-competitive activity<sup>3</sup>.

1 See the Water Act 2003 s 34; and **WATER AND WATERWAYS** vol 100 (2009) PARA 109.

2 See the Water Industry Act 1991 s 2; and **WATER AND WATERWAYS** vol 100 (2009) PARA 130.

3 See the Competition Act 1998 s 54, Sch 10; and PARA 147.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(v) The Sectoral Regulators/22. Office of Rail Regulation.

## **22. Office of Rail Regulation.**

The Office of Rail Regulation ('ORR') was established by the Railways and Transport Safety Act 2003<sup>1</sup>. The ORR has a duty to exercise its functions in the manner which it considers best calculated: (1) to promote improvements in railway service performance; (2) otherwise to protect the interests of users of railway services; (3) to promote the use of the railway network in Great Britain for the carriage of passengers and goods, and the development of that railway network, to the greatest extent that it considers economically practicable; (4) to contribute to the development of an integrated system of transport of passengers and goods; (5) to contribute to the achievement of sustainable development; (6) to promote efficiency and economy on the part of persons providing railway services; (7) to promote competition in the provision of railway services for the benefit of users of railway services; (8) to promote measures designed to facilitate the making by passengers of journeys which involve use of the services of more than one passenger service operator; (9) to impose on the operators of railway services the minimum restrictions which are consistent with the performance of its functions that are not safety functions; (10) to enable persons providing railway services to plan the future of their businesses with a reasonable degree of assurance<sup>2</sup>.

Certain functions of the Office of Fair Trading (the 'OFT')<sup>3</sup> under Part 4 of the Enterprise Act 2002<sup>4</sup>, so far as relating to the supply of services relating to railways, are concurrent functions of the ORR and the OFT<sup>5</sup>.

The ORR also is entitled to exercise, concurrently with the OFT, the functions of the OFT under the provisions of Part 1 of the Competition Act 1998<sup>6</sup> in connection with: (a) agreements, decisions or concerted practices which may affect trade within the United Kingdom and which have as their object or effect the prevention, restriction or distortion of competition; and (b) conduct amounting to abuse of a dominant market position, so far as they relate to the supply of services relating to railways<sup>7</sup>.

1 See the Railways and Transport Safety Act 2003 s 15, Sch 1; and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 47 et seq.

2 See the Railways Act 1993 s 4(1); and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 33.

3 As to the OFT see PARAS 6-8.

4 I.e. the Enterprise Act 2002 Pt 4 (ss 131-184) (see PARA 276 et seq).

5 See the Railways Act 1993 s 67(2), (2A); and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 186.

6 I.e. the Competition Act 1998 Pt 1 (ss 1-60) (see PARA 115 et seq).

7 See Railways Act 1993 s 67(3); and **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 186.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/1. INTRODUCTION/(2) ADMINISTRATIVE AUTHORITIES/(vi) The European Commission/23. Role of the European Commission.

## **(vi) The European Commission**

### **23. Role of the European Commission.**

The European Commission has a Directorate specifically responsible for competition policy<sup>1</sup>. Its mission is to enforce the competition rules of the Community Treaties<sup>2</sup> in order to ensure that competition is not distorted and markets operate as efficiently as possible, thereby contributing to the welfare of consumers and to the competitiveness of the European economy. In order to fulfil its objectives, the Directorate General for Competition concentrates on five key areas: (1) the enforcement of competition rules on antitrust, mergers, state infringements and state aid control<sup>3</sup>; (2) sector inquiries and market monitoring<sup>4</sup>; (3) policy development; (4) competition advocacy<sup>5</sup>; and (5) international cooperation<sup>6</sup>.

It is usual for proceedings against the European Commission in competition cases to be brought before the Court of First Instance (CFI)<sup>7</sup>. Appeals from the CFI are heard by the European Court of Justice on points of law only<sup>8</sup>.

1 I.e. the Directorate General for Competition (DG COMP).

2 See PARA 4.

3 See PARA 107 et seq.

4 See PARA 90.

5 I.e. actions aimed at influencing regulatory processes to ensure better and pro-competitive regulation.

6 See PARA 34.

7 I.e. under the EC Treaty arts 229, 230, 232.

8 See eg Case C-7/95 P *John Deere Ltd v European Commission* [1998] ECR I-3111, [1998] 5 CMLR 311; Case C-551/03 P *General Motors BV v European Commission* [2006] ECR I-3173, [2006] 5 CMLR 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(1) INTRODUCTION/(i) Objectives of the European Community/24. Principles.

## **2. COMMUNITY ASPECTS OF COMPETITION LAW**

### **(1) INTRODUCTION**

#### **(i) Objectives of the European Community**

##### **24. Principles.**

The objectives of the European Community are set out in article 2 of the EC Treaty<sup>1</sup> wherein it establishes a common market and an economic and monetary union and by implementing the common policies or activities referred to in articles 3 and 4, aims to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, sustainable and non-inflationary growth, a high level of protection and improvement of the quality of the environment, a high degree of competitiveness and convergence of economic performance, a high level of employment and of social protection, equality between men and women, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among member states.

The objectives set out in article 2 can be seen as falling into two groups. Firstly, there is the political objective of closer relations between member states; and in the second group, there are the economic objectives of harmonious and sustainable development of economic activities and expansion, increased stability and raising of the standard of living.

Whilst the terms of article 2 lay down the broad objectives of the Community, article 3 of the Treaty sets out the manner in which the objectives are to be achieved. The terms of article 3 can be divided into three groupings. Firstly there are those paragraphs which are the means by which the achievement of an economic union between the member states is to be maintained; secondly those paragraphs which concern the progressive approximation of economic policies; and thirdly those arising from the existence of the European Union<sup>2</sup>.

Articles 4 and 5 deal with economic and monetary union and subsidiarity<sup>3</sup>. Article 6 deals with the requirement that regard is to be had to environmental protection in the development of Community policies<sup>4</sup>. Article 7 provides an outline of the institutions to be established under the Treaty, to administer the policies therein enumerated; the institutions mentioned are an Assembly (the European Parliament), a Council, a Commission, a Court of Justice and a Court of Auditors. That article also provides that an Economic and Social Committee and a Committee of the Regions are to assist the Council and the Commission in an advisory capacity<sup>5</sup>.

Articles 8 and 9 deal with the establishment of a European Central Bank<sup>6</sup>. Article 10 requires member states to take appropriate measures to ensure the fulfilment of the obligations arising out of the Treaty or from acts of the institutions and to abstain from any measure which could jeopardise the attainment of the objectives of the Treaty<sup>7</sup>. Article 11 provides a framework for an extension of the activities of the Community institutions into other areas agreed on a bilateral basis between member states<sup>8</sup>. Article 12 contains a general prohibition on discrimination on the grounds of nationality although more specific provisions are contained in the later provisions of the Treaty<sup>9</sup>.

Article 13 allows the Council to take action to combat discrimination on the basis of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation<sup>10</sup>. Articles 14 and 15 provide a timetable for the establishment of the internal market<sup>11</sup>. Articles 17 to 22 (Part Two of the Treaty) make provision for citizenship of the European Union<sup>12</sup>.



1       le the Treaty establishing the European Economic Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179) art 2. The European Economic Community was renamed the European Community and the EEC Treaty was renamed the EC Treaty by the Treaty on European Union (the 'Maastricht Treaty') which came into force on 1 November 1993. The articles, titles and sections of the EC Treaty, as amended by the Treaty of Amsterdam (Cmnd 3780), are renumbered in accordance with the table of equivalences set out in the Annex to that Treaty and the new numbering is used in this title.

2       See the EC Treaty art 3.

3       See the EC Treaty arts 4, 5.

4       See the EC Treaty art 6.

5       See the EC Treaty art 7.

6       See the EC Treaty arts 8, 9.

7       See the EC Treaty art 10.

8       See the EC Treaty art 11.

9       See the EC Treaty art 12.

10      See the EC Treaty art 13.

11      See the EC Treaty arts 13-15.

12      See the EC Treaty arts 17-22.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(1) INTRODUCTION/(i) Objectives of the European Community/25. The foundations and policy of the Community.

## **25. The foundations and policy of the Community.**

Part Three of the EC Treaty<sup>1</sup>, entitled 'Community Policies' lays down rules aimed at ensuring the establishment of a system of free movement of goods<sup>2</sup>, persons<sup>3</sup>, services<sup>4</sup>, visas, asylum and immigration<sup>5</sup> and of capital<sup>6</sup>. It also provides detailed rules for the establishment of a common agricultural policy<sup>7</sup>, rules on transport<sup>8</sup>, economic and monetary policy<sup>9</sup>, competition<sup>10</sup>, taxation<sup>11</sup>, approximation of laws<sup>12</sup>, employment<sup>13</sup>, common commercial policy<sup>14</sup>, social policy<sup>15</sup>, customs co-operation<sup>16</sup>, education<sup>17</sup>, vocational training<sup>18</sup>, culture<sup>19</sup>, public health<sup>20</sup>, consumer protection<sup>21</sup>, trans-European networks<sup>22</sup>, industry<sup>23</sup>, economic and social cohesion<sup>24</sup>, research and technological development<sup>25</sup>, environment<sup>26</sup> and development co-operation<sup>27</sup>.

Titles V and VI of Part Three of the Treaty are divided into sections dealing inter alia with common rules on competition<sup>28</sup>, tax<sup>29</sup> and approximation of laws<sup>30</sup>, economic policy<sup>31</sup>, customs co-operation<sup>32</sup>, social policy<sup>33</sup> and culture<sup>34</sup>.

In Part Three, Title VI, Chapter 1 provides common rules on competition policy applicable to both private and public enterprises within the Community<sup>35</sup> and with rules on state aids<sup>36</sup>. Chapter 2 deals with common tax provisions<sup>37</sup> and rules on the approximation of laws are dealt with in Chapter 3<sup>38</sup>.

Titles VII, VIII and IX deal with economic policy<sup>39</sup>, employment<sup>40</sup> and with the provision of a common commercial policy<sup>41</sup>.

Title XI deals with social policy<sup>42</sup>, the establishment of the European Social Fund<sup>43</sup> and education and vocational training<sup>44</sup>. Title XII provides for cultural action<sup>45</sup>. Title XIII deals with public

health<sup>46</sup>. Title XIV deals with consumer protection<sup>47</sup>. Title XV deals with trans-European networks<sup>48</sup>. Title XVI deals with industrial policy<sup>49</sup>. Title XVII deals with economic and social cohesion<sup>50</sup>. Title XVIII deals with research and technological development<sup>51</sup>. Title XIX deals with the environment<sup>52</sup>. Title XX deals with development co-operation<sup>53</sup>. Title XXI deals with economic, financial and technical cooperation with third countries<sup>54</sup>.

Part Four of the Treaty is concerned with the association of overseas countries and territories<sup>55</sup>. Part Five lays down rules governing the institutions of the Community set up under article 7 of the Treaty<sup>56</sup>. Part Six contains general and final provisions<sup>57</sup>.

1 The EC Treaty Pt 3 comprises arts 23-181a. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

2 See the EC Treaty Pt 3 Title I (arts 23-31).

3 See the EC Treaty Pt 3 Title III, Chs 1, 2 (arts 39-48).

4 See the EC Treaty Pt 3 Title III, Ch 3 (art 49-55).

5 See the EC Treaty Pt 3 Title IV (arts 61-69).

6 See the EC Treaty Pt 3 Title III, Ch 4 (arts 56-60).

7 See the EC Treaty Pt 3 Title II (arts 32-38).

8 See the EC Treaty Pt 3 Title V (arts 70-80).

9 See the EC Treaty Pt 3 Title VII (arts 98-124).

10 See the EC Treaty Pt 3 Title VI, Ch 1, Sections 1, 2 (arts 81-89).

11 See the EC Treaty Pt 3 Title VI, Ch 2 (arts 90-93).

12 See the EC Treaty Pt 3 Title VI, Ch 3 (arts 94-97).

13 See the EC Treaty Pt 3 Title VIII (arts 125-130).

14 See the EC Treaty Pt 3 Title IX (arts 131-134).

15 See the EC Treaty Pt 3 Title XI, Chs 1, 2 (arts 136-148).

16 See the EC Treaty Pt 3 Title X (art 135).

17 See the EC Treaty Pt 3 Title XI, Ch 3 art 149.

18 See the EC Treaty Pt 3 Title XI, Ch 3 art 150.

19 See the EC Treaty Pt 3 Title XII (art 151).

20 See the EC Treaty Pt 3 Title XIII (art 152).

21 See the EC Treaty Pt 3 Title XIV (art 153).

22 See the EC Treaty Pt 3 Title XV (arts 154-156).

23 See the EC Treaty Pt 3 Title XVI (art 157).

24 See the EC Treaty Pt 3 Title XVII (art 158-162).

25 See the EC Treaty Pt 3 Title XVIII (arts 163-173).

26 See the EC Treaty Pt 3 Title XIX (arts 174-176).

27 See the EC Treaty Pt 3 Title XX (arts 177-181).

- 28 See the EC Treaty Pt 3 Title VI, Ch 1, Sections 1, 2 (arts 81-89).
- 29 See the EC Treaty Pt 3 Title VI, Ch 2 (arts 90-93).
- 30 See the EC Treaty Pt 3 Title VI, Ch 3 (arts 94-97).
- 31 See the EC Treaty Pt 3 Titles VII-IX (arts 98-134).
- 32 See the EC Treaty Pt 3 Title X (art 135).
- 33 See the EC Treaty Pt 3 Title XI (arts 136-150).
- 34 See the EC Treaty Pt 3 Title XII (art 151).
- 35 See the EC Treaty Pt 3 Title VI, Ch 1, Section 1 (arts 81-86).
- 36 See the EC Treaty Pt 3 Title VI, Ch 1, Section 2 (arts 87-89).
- 37 See the EC Treaty Pt 3 Title VI, Ch 2 (arts 90-93).
- 38 See the EC Treaty Pt 3 Title VI, Ch 3 (arts 94-97).
- 39 See the EC Treaty Pt 3 Title VII, Chs 1-3 (arts 98-115).
- 40 See the EC Treaty Pt 3 Title VIII (arts 125-130).
- 41 See the EC Treaty Pt 3 Title IX (arts 131-134).
- 42 See the EC Treaty Pt 3 Title XI, Ch 1 (arts 136-145).
- 43 See the EC Treaty Pt 3 Title XI, Ch 2 (arts 146-148).
- 44 See the EC Treaty Pt 3 Title XI, Ch 3 (arts 149-150).
- 45 See the EC Treaty Pt 3 Title XII (art 151).
- 46 See the EC Treaty Pt 3 Title XIII (art 152).
- 47 See the EC Treaty Pt 3 Title XIV (art 153).
- 48 See the EC Treaty Pt 3 Title XV (arts 154-156).
- 49 See the EC Treaty Pt 3 Title XVI (art 157).
- 50 See the EC Treaty Pt 3 Title XVII (arts 158-162).
- 51 See the EC Treaty Pt 3 Title XVIII (arts 163-173).
- 52 See the EC Treaty Pt 3 Title XIX (arts 174-176).
- 53 See the EC Treaty Pt 3 Title XX (arts 177-181).
- 54 See the EC Treaty Pt 3 Title XXI (art 181a).
- 55 See the EC Treaty Pt 4 (arts 182-188).
- 56 See the EC Treaty Pt 5 (arts 189-280).
- 57 See the EC Treaty Pt 6 (arts 281-314).

## (ii) The Competition Rules within the Treaty Framework

### 26. Tasks and objectives.

Article 2 of the EC Treaty provides a number of tasks which the Community is to have, including the promotion of a harmonious development of economic activities and the raising of living standards<sup>1</sup>. These objectives can, however, provide no more than a general outline of the role of the Community and article 3 is concerned with some of the areas in which these general objectives are to be ensured<sup>2</sup>.

Of these, the most relevant for the purposes of competition law is the requirement that the activities of the Community are to include the institution of a system ensuring that competition in the internal market is not distorted<sup>3</sup>. Whilst this statement merely provides the general aim of the competition policy, it forms the basic tenet of that policy and one that is directly referred to in judgments of the Court of Justice<sup>4</sup>.

One of the problems of this requirement, however, is whether the competition which is not to be distorted is that of 'free' competition or that of 'fair' competition; the system cannot maintain both. 'Free' competition assumes a *laissez faire* approach to the problem - letting natural market forces of supply and demand find their own levels and ensuring that the strong will prevail over the weak. 'Fair' competition, on the other hand, implies some control of the market to ensure that it develops in accordance with certain pre-determined norms of business behaviour.

As far as Community competition policy is concerned, the basic approach appears to be that of free competition, whilst having rules, particularly in relation to dominant firms, to ensure that the competitive structure of the market is not irreparably damaged by any use of unfair market behaviour.

1 See the EC Treaty art 2. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

2 See the EC Treaty art 3.

3 See the EC Treaty art 3(g).

4 See eg PARAS 27, 60, 73.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(1) INTRODUCTION/(ii) The Competition Rules within the Treaty Framework/27. Treaty provisions dealing with competition.

### 27. Treaty provisions dealing with competition.

In implementation of the objectives of the general requirement concerning competition<sup>1</sup>, the EC Treaty contains detailed provisions in articles 81 to 94 indicating the types of behaviour which generally will and will not be permitted.

Articles 81 to 85 contain provisions applicable to private firms aimed at ensuring that the creation of effective conditions of competition is not hindered by the erection of barriers or restrictions by the firms themselves. The maintenance of competition is therefore an essential

part of the Community's economic and legal order. Where any question of interpretation of these articles arises, they are to be interpreted in accordance with the general provisions of the Treaty<sup>2</sup>. Articles 81 and 82 cannot be interpreted in such a way that they contradict each other because they serve to achieve the same aim<sup>3</sup>.

Government procurement is to be made on the basis of non-discrimination, and article 86 provides in the case of public undertakings and undertakings to which member states grant special or exclusive rights, member states must neither enact nor maintain in force any measure contrary to the rules contained in the Treaty<sup>4</sup> - in effect that public enterprises are to be treated no more favourably than private enterprises<sup>5</sup>. In addition, undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly are subject to the rules contained in the Treaty, and in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them<sup>6</sup>.

Articles 87 to 89 are designed to ensure that competition between firms in different member states is not distorted through the granting of state aids<sup>7</sup>.

1        Ie the EC Treaty art 3(g) (see PARA 26). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

2        Ie the EC Treaty arts 2, 3(g): Case 311/85 *Vereniging van Vlaamse Reisbureaus v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, [1984] 4 CMLR 213, ECJ. As to the EC Treaty arts 83, 84, which set down certain transitional provisions, see PARA 87.

3        Case 6/72 *Europemballage Corp and Continental Can Co Inc v EC Commission* [1973] ECR 215, [1973] CMLR 199, ECJ.

4        EC Treaty art 86(1).

5        EC Treaty art 86(1). See EC Commission Decision 89/205 (*Magill TV Guide*) OJ L78, 21.3.89, p 43, [1989] 4 CMLR 757; Joined Cases C-241, 242/91P *Radio Telefis Eireann v EC Commission* [1995] ECR I-743, [1995] 4 CMLR 718, ECJ; EC Commission Decision 90/16 (*Express Delivery Services in the Netherlands*) OJ L10, 12.1.90, p 47. This decision was subsequently annulled by the Court of Justice: see Joined Cases C-48, 66/90 *Netherlands v EC Commission* [1992] ECR I-565, [1993] 5 CMLR 316, ECJ.

6        EC Treaty art 86(2). See eg Joined Cases T-528, 542, 543, 546/93 *Métropole Télévision SA v EC Commission* [1996] ECR II-649, [1996] 5 CMLR 386, CFI (decision to grant exemption under art 81(3) not to be based solely upon a criterion defined by reference to art 86(2)).

7        EC Treaty art 87 provides that, save as otherwise provided in the Treaty, any aid granted by a member state or through state resources in any form whatsoever (for example regional aid, sectoral aid, agricultural aid) which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between member states, incompatible with the common market. Member states are obliged to keep the Commission informed of state aids which they propose to make: see EC Treaty art 88. See also EC Commission Regulation 800/2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ L214, 9.8.2008, p 3) (the General Block Exemption Regulation) under which numerous state aid measures are exempted from the obligation to be notified to the Commission.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(1) INTRODUCTION/(iii) Community Law and National Law/28. The supremacy and direct effect of Community law.

### **(iii) Community Law and National Law**

#### **28. The supremacy and direct effect of Community law.**

The supremacy of Community law over conflicting rules of national law has been a long-established principle of the Community's legal order. The principles of supremacy<sup>1</sup> and direct applicability<sup>2</sup> of Community law have been affirmed by the European Court of Justice. From a comparatively early stage, articles 81 and 82 of the EC Treaty have been directly effective in the member states<sup>3</sup>.

1 See Case 6/64 *Costa v ENEL* [1964] ECR 585 at 593-594, [1964] CMLR 425 at 455-456, ECJ: 'By contrast with ordinary international treaties, the [EC] Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights albeit within limited fields and have thus created a body of law which binds both their nationals and themselves.

The precedence of Community law is confirmed by article [249] whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be over-ridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from the domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it the permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently article [234] is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise'.

See further Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 1, [1969] CMLR 100, ECJ.

2 See Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 at 643, [1978] 3 CMLR 263 at 282-283, ECJ: 'Direct applicability in such circumstances means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entering into force and for so long as they continue in force.

These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community Law.

Furthermore, in accordance with the principle of the precedence of Community law, the relationship between the provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures do not only by their entry into force render automatically inapplicable any conflicting provision of current national law but - in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States - also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'.

3 See eg Case 127/73 *Belgische Radio en Televisie v SV SABAM* [1974] ECR 51, [1974] 2 CMLR 238, ECJ; Case C-453/99 *Courage Ltd v Crehan* [2002] QB 507, [2001] All ER (EC) 886, ECJ.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(1) INTRODUCTION/(iii) Community Law and National Law/29. Enforcement and the Modernisation Regulation.

## 29. Enforcement and the Modernisation Regulation.

As from 2004, the Modernisation Regulation requires that, in addition to national competition law, national competition authorities<sup>1</sup> must apply the provisions of article 81 of the EC Treaty to agreements, decisions by associations of undertakings or concerted practices, and of article 82 of the EC Treaty to abuses falling within that article<sup>2</sup>.

In any national or Community proceedings for the application of articles 81 and 82 of the Treaty, the burden of proving an infringement of article 81(1) or of article 82 of the Treaty rests on the party or the authority alleging the infringement. The undertaking or association of undertakings claiming the benefit of article 81(3) of the Treaty must bear the burden of proving that the conditions of that paragraph are fulfilled<sup>3</sup>.

However, the application of national competition law must not, generally speaking, lead to a stricter prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between member states but which do not restrict competition within the meaning of article 81, or which are permitted by reason of or under the criteria set out in that article<sup>4</sup>. Member states are not otherwise precluded by the Modernisation Regulation from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings<sup>5</sup>.

This does not apply when the competition authorities and the courts of the member states apply national merger control laws, and does not preclude the application of provisions of national law that predominantly pursue an objective different from that pursued by articles 81 and 82 of the Treaty<sup>6</sup>.

Provisions of the Modernisation Regulation set out the enforcement powers and responsibilities of the Commission, national competition authorities and national courts in the implementation and application of articles 81 and 82. The Commission has the specific powers set out in the Regulation<sup>7</sup>, while the national competition authorities have the power to apply articles 81 and 82 in individual cases<sup>8</sup>. Specific provision is made for the co-operation between the Commission and the national competition authorities<sup>9</sup>, which has included the formation of a network of public authorities (the European Competition Network) which co-ordinates such co-operation and deals with allocation of work among the Commission and national authorities<sup>10</sup>. In particular, if a national competition authority informs the Commission that it intends to adopt a decision based on EC competition law, the Commission may instead initiate proceedings which has the effect of ending the national process<sup>11</sup>. National competition authorities and national courts cannot make decisions or rulings which are contrary to pre-existing or contemplated decisions of the Commission<sup>12</sup>.

National courts also have power to apply articles 81 and 82<sup>13</sup>. It appears from this and the authorities that private enforcement, leading to damages, is available in respect of infringement of those articles<sup>14</sup>.

The procedural aspects of the enforcement regime under the Modernisation Regulation are discussed subsequently<sup>15</sup>.

1 The designated national competition authorities of the United Kingdom are the Office of Fair Trading and the sectoral regulators: see the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261, reg 3. As to the sectoral regulators see the Competition Act 1998 s 54(1); and PARA 147.

2 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 3(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

3 EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 2.

4 EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 3(2).

5 EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 3(2).

6 EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 3(3). See *Days Healthcare UK Ltd v Pihsiang Machinery Manufacturing Co Ltd* [2006] EWHC 1444 (QB), [2006] 4 All ER 233.

7 See EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 4. As to those powers see further arts 7-10 (Commission decisions), 17-22 (investigations), 23-24 (penalties).

8 See EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 5.

9 See EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) arts 11-16.

10 See the *Notice on NCA cooperation* OJ [2004] C 101/43.

11 See EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 11(6).

12 See EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 16.

13 See EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 6. Specific provision is made outlining the requisite co-operation between the national courts and the Commission: art 15.

14 See eg Case C-453/99 *Courage Ltd v Crehan* [2002] QB 507, [2001] All ER (EC) 886, ECJ; Case C-295-298/04 *Manfredi v Lloyd Adriatico Assicurazione SpA* [2007] All ER (EC) 27, [2006] ECR I-6619, [2006] CMLR 17, ECJ; *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130, [1983] 2 All ER 770, HL.

15 See PARA 88 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(1) INTRODUCTION/(iv) European Economic Area/30. Competition rules.

## **(iv) European Economic Area**

### **30. Competition rules.**

The competition rules of the European Economic Area ('EEA') Agreement<sup>1</sup> mirror those of the EC Treaty as regards:

- (1) restrictive agreements<sup>2</sup>;
- (2) abuse of a dominant position<sup>3</sup>;
- (3) mergers<sup>4</sup>;
- (4) state aids<sup>5</sup>; and
- (5) public undertakings<sup>6</sup>.

Secondary legislation corresponds to the equivalent Community legislation. In addition, the Community notices on competition will apply and equivalent notices have been issued by the EFTA Surveillance Authority, the EEA equivalent in competition matters to the Commission<sup>7</sup>.

1 I.e. the Agreement on the European Economic Area (Oporto, 2 May 1992; Cm 2073 (OJ L1, 3.1.94, p 3)) as adjusted by the Protocol (Brussels, 17 March 1993; Cm 2183 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'). The agreement was implemented in the United Kingdom by the European Economic Area Act 1993 which came into force on 5 November 1993. See also PARA 36. The competition rules comprise EEA Agreement, Pt IV, Chs 1, 2, Protocols 21-27 and Annexes XIV-XVI.

2 See the EEA Agreement art 53.

3 See the EEA Agreement art 54.



4 See the EEA Agreement art 57.

5 See the EEA Agreement arts 61-64.

6 See the EEA Agreement art 59.

7 See Decision of the EFTA Surveillance Authority on the issuing of 10 notices and guidelines in the field of competition (OJ L153, 18.6.94, p 1) which deals with: (1) restrictions ancillary to concentrations; (2) concentrative and co-operative operations; (3) exclusive distribution and purchasing; (4) motor vehicles; (5) commercial agents; (6) co-operation; (7) imports from outside the EEA; (8) sub-contracting; (9) agreements of minor importance; and (10) telecommunications. See also Decision of the EFTA Surveillance Authority on the issuing of three notices in the field of competition (OJ L186, 21.7.94, p 57), dealing with co-operative joint ventures and exclusive supply agreements; Notice on Co-operation between the National Courts and the EFTA Surveillance Authority in applying EEA Agreement arts 53, 54 (OJ C112, 1995, p 7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(1) INTRODUCTION/(iv) European Economic Area/31. Jurisdiction.

### **31. Jurisdiction.**

Rules exist in the European Economic Area ('EEA') Agreement on the division of responsibility as between the EFTA Surveillance Authority and the Commission<sup>1</sup> but it is only in cases of mixed jurisdiction that the rules are necessary. In most cases it will be the Commission that will have jurisdiction.

Decisions of the Commission applying the EEA competition rules are subject to control and review by the Court of First Instance and the Court of Justice; those of the EFTA Surveillance Authority by the EFTA Court<sup>2</sup>.

1 EEA Agreement art 56(1)(a), (c). As to the EEA Agreement see PARA 30 note 1.

2 See eg the Decision of the EFTA Surveillance Authority (OJ L231, 3.9.94, p 1 (as amended)) on state aids annulled by the EFTA Court in Case E-2/94 *Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority* [1995] 1 CMLR 851, EFTA Ct.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(i) The Relevant Market/32. The 'relevant market'.

## **(2) COMMON PRINCIPLES**

### **(i) The Relevant Market**

#### **32. The 'relevant market'.**

The application and interpretation of competition law is primarily concerned with the exercise of market power; and for the purposes of assessing market power, it is necessary for the relevant market to be ascertainable, in terms of the relevant product market, geographical market and sometimes the temporal market<sup>1</sup>.

In December 1997 the Commission published its Notice on the Definition of the Relevant Market for the purposes of Community Competition Law<sup>2</sup>.

On a geographical front, the notice states that in determining the relevant market the Commission will generally look at: (1) the distribution of market shares; and (2) price differences. This will then be tested against an analysis of demand characteristics: past evidence of diversion of orders to other areas; basic demand characteristics; views of customers and competitors concerning the boundary of the geographic market; current geographic patterns of purchases of actual customers; trade flows in cases where the number of customers is high; barriers and switching costs, in particular transport costs<sup>3</sup>.

On a market front, the notice states that the main purpose of market definition is 'to identify in a systematic way the competitive restraints that the undertakings face' through the identification of those actual competitors who are capable of constraining their behaviour and preventing them from behaving independently of effective competitive pressure. In arriving at this determination, the Commission will consider both the products from which that restraint derives and the geographic market in which it operates. Overall, the notice talks about demand and supply substitution but, interestingly, makes it clear that potential competition is not to be taken into account since the extent to which potential competitors can provide a restraining influence will be very dependent on market entry barriers<sup>4</sup>.

1 See eg Case 6/72 *Europemballage Corp and Continental Can Co Inc v EC Commission* [1973] ECR 215, [1973] CMLR 199, ECJ; Case 27/76 *United Brands Co v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429, ECJ; Case C-234/89 *Delimitis v Henninger Bräu AG* [1991] ECR I-935, [1992] 5 CMLR 210, ECJ.

2 EC Commission Notice on the Definition of the Relevant Market for the purposes of Community Competition Law (OJ C372, 9.12.97, p 5). See also Case 247/86 *Société Alsacienne et Lorraine de Télécommunications et d'Electronique (ALSATEL) v Novasam SA* [1988] ECR 5987, [1990] 4 CMLR 434, ECJ.

3 EC Commission Notice on the Definition of the Relevant Market for the purposes of Community Competition Law (OJ C372, 9.12.97, p 5).

4 EC Commission Notice on the Definition of the Relevant Market for the purposes of Community Competition Law (OJ C372, 9.12.97, p 5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/33. Application within Community territory.

## **(ii) Scope of European Competition Law**

### **A. GEOGRAPHICAL**

#### **33. Application within Community territory.**

The competition rules of the European Community apply in the 27 member states: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark (but excluding the Faeroe Islands<sup>1</sup> and Greenland<sup>2</sup>), Estonia, Finland, Germany (both what was the Federal Republic as well as what was the German Democratic Republic since 30 October 1990), France (including French Overseas Departments (Reunion, Guadeloupe, Guiana, Martinique and Saint-Pierre-et-Miquelon) but not the dependant overseas territories<sup>3</sup>), Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands (excluding the Netherlands Antilles), Poland, Portugal (including the Azores and Madeira but not Macao<sup>4</sup>), Romania, Slovenia, Slovakia, Spain

(including the Canary Islands, Ceuta and Melilla, which are cities on the Mediterranean coast of Morocco and are autonomous regions of Spain), Sweden and the United Kingdom (including Gibraltar) (although the position of the Channel Islands and the Isle of Man is slightly different<sup>5</sup>). Andorra<sup>6</sup>, Monaco<sup>7</sup>, San Marino, the Vatican City and the sovereign base areas of the United Kingdom in Cyprus<sup>8</sup> and the member states are almost certainly also covered by the extra-territorial reach of competition rules.

1 EC Treaty art 299 (originally added by the Act of Accession (1972) and applied by the Act of Accession of Denmark art 26); Act of Accession (1972), Protocols 2, 4. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

2 Treaty amending, with regard to Greenland, the Treaties establishing the European Communities and Protocol on special arrangements for Greenland (Brussels, 13 March 1984; EC 19 (1985); Cmnd 9490; OJ L29, 1.2.85, p1).

3 EC Treaty art 299.

4 See Answer to Written Question 401/85 (OJ C251/85, p 26).

5 EC Treaty art 299 (as applied by the Act of Accession (1972) art 26 and Protocol 3 annexed thereto).

6 EC Treaty art 299.

7 See Answer to Written Questions 191/78 (OJ C238/78, p 14) and 113/81 (OJ C153/81, p 19).

8 See Answer to Written Question 213/81 (OJ C210/81, p 14).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/34. Extra-territoriality.

### **34. Extra-territoriality.**

In several cases, the Commission has also sought to exercise its powers under articles 81 and 82 of the EC Treaty<sup>1</sup> against undertakings from non-member states. The Court of Justice has upheld the jurisdiction over these undertakings in competition matters subject to the requirement that the agreement etc in question must have 'affected trade between member states'<sup>2</sup>. In practice, however, most jurisprudence has been based on the 'economic entity doctrine' rather than on the 'effects doctrine'<sup>3</sup>.

The fact that the Commission seeks to exercise jurisdiction over such companies does not, however, mean that it is able to obtain information from them and conduct investigations at their premises outside the Community<sup>4</sup>. Where the Commission sends requests for information to an undertaking outside the Community, the enforcement of such request<sup>5</sup> is a delicate matter normally dealt with through diplomatic channels. Thus, in one case, the Commission ordered the undertakings concerned 'to refrain from implementing the notified arrangements in the [European Community]'<sup>6</sup>.

As far as the enforcement of decisions against undertakings outside the Community is concerned, once a final decision has been taken under article 81 or 82, the Commission will serve that decision at the registered office or place of business within the Community of the undertaking complained against or of one of its subsidiaries<sup>7</sup>. For the purposes of Community competition policy the Commission and the Court of Justice treat groups of undertakings as a

single entity and the strict legal separation of parent and subsidiary is not a concept that the competition authorities of the Community regard as restricting them in this matter<sup>8</sup>.

Latterly the EC has entered into agreements with other states or groups of states a purpose of which is to develop international co-operation in the prevention of anti-competitive practices<sup>9</sup>. Such agreements reduce the need to apply rules of extra-territoriality.

1 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. As to art 81 see PARA 61 et seq; and as to art 82 see PARA 68 et seq.

2 EC Commission Decision 70/332 (*Kodak*) OJ L147, 7.7.70, p 24, [1970] CMLR D19.

3 EC Commission Decision 69/243 (*Aniline Dyestuffs Cartel*) OJ L195, 7.8.69, p 11, [1969] CMLR D23. For a case where the application of the EC Treaty art 81 outside the Community was confirmed see Joined Cases 89, 104, 116, 117, 125-129/85 *Ahlström Osakeyhtiö v EC Commission* [1988] ECR 5193, [1988] 4 CMLR 901, ECJ.

4 Ie under EC Council Regulation 17 of 6 February 1962 (OJ 1962 p 204 (S Edn 1959-1962 p 87)) art 4, para 2(1).

5 Ie under a decision under EC Council Regulation 17 of 6 February 1962 (OJ 1962 p 204 (S Edn 1959-1962 p 87)) art 11.

6 See EC Commission Decision 91/301 (*ANSAC*) OJ L152, 15.6.91, p 54. This reflected the limits on Community jurisdiction articulated in Joined Cases 89, 104, 116, 117, 125-129/85 *Ahlström Osakeyhtiö v EC Commission* [1988] ECR 5193, [1988] 4 CMLR 901, ECJ (the *Woodpulp* case).

7 EC Commission Decision 89/190 (*PVC*) OJ L74, 17.3.89, p 1.

8 EC Commission Decision 69/243 (*Aniline Dyestuffs Cartel*) OJ L195, 7.8.69, p 11, [1969] CMLR D23. See also EC Commission Decision 85/206 (*Aluminium Imports from Eastern Europe*) OJ L92, 30.3.85, p 1; and EC Commission Decision 72/21 (*Continental Can Co*) OJ L7, 8.1.72, p 25, [1972] CMLR D11. See also PARA 61 et seq.

9 See PARA 35 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/35. Bilateral agreements with non-member states.

### **35. Bilateral agreements with non-member states.**

In addition to the application of the Community rules on competition throughout the member states, the Community has also negotiated a number of bilateral agreements with non-member states in Europe that contain provisions on competition law, a number of which have been superseded by the EEA Agreement<sup>1</sup> or by the accession of the state in question to the EC<sup>2</sup>. These included an association agreement between the Community and Turkey<sup>3</sup>.

A trade agreement which contains provisions on competition law was entered into between the Community and Switzerland<sup>4</sup>. Joint committees are established which are responsible for the administration of the agreement but their activity in the sphere of competition has been minimal.

The Commission has applied articles 81 and 82 of the EC Treaty to enterprises established in Switzerland after the conclusion of the trade agreement in question but without applying the agreement<sup>5</sup>.

The legal effect of the trade agreements has been unclear but, since a decision of the Court of Justice in 1982, it does appear that the trade agreements, and in particular the competition

clauses contained therein, are not directly applicable either in the member states or in such non-member state<sup>6</sup>.

1 See PARA 36.

2 Such was the case in relation to Austria, Finland, Greece, Portugal and Sweden. This was also the position in relation to the 'Europe' Agreements made between the EC and Poland, the Czech and Slovak Republics, Hungary, Romania, Bulgaria, Estonia, Lithuania, Latvia and Slovenia.

3 Agreement establishing an Association between the EC and Turkey (OJ 1964 p 3687; OJ C113, 24.12.73, p 2). Competition matters are now largely governed by Decision No 1/95 of the Association Council (1995) between the EU and Turkey on implementing the final phase of the Customs Union (OJ L35, 13.2.1996, p 1). Turkey entered into accession negotiations in 2005.

4 Agreement establishing an Association between the EC and the Swiss Confederation (Brussels, 22 July 1972; OJ L 300, 31.12.72, p 189 (S Edn 1972 (31 December) (1) p 191)).

5 EC Commission Decision 76/642 (*Hoffmann-La Roche (Vitamins)*) OJ L223, 16.8.76, p 27, [1976] 2 CMLR D25.

6 See Case 270/80 *Polydor Ltd v Harlequin Record Shops Ltd* [1982] ECR 329, [1982] 1 CMLR 677, ECJ (the *Polydor* case), which dealt with the Portuguese Trade Agreement.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/36. European Economic Area Agreement.

### **36. European Economic Area Agreement.**

In September 1992 the member states of the European Community and the seven European Free Trade Association ('EFTA') countries (Norway, Sweden, Finland, Austria, Switzerland, Liechtenstein and Iceland) entered into the European Economic Area ('EEA') Agreement<sup>1</sup> to replace the various bilateral free trade agreements which had been entered into. Austria, Finland and Sweden have since become members of the EC. Due to non-ratification, Switzerland remains outside the EEA Agreement.

The EEA Agreement contains provisions mirroring those of the EC Treaty<sup>2</sup> in relation to restrictive agreements<sup>3</sup>, abuse of a dominant position<sup>4</sup>, mergers<sup>5</sup>, state aids<sup>6</sup> and public undertakings<sup>7</sup>. Secondary legislation including that dealing with block exemptions also exists mirroring those of the Community<sup>8</sup>.

Like articles 81 and 82 of the EC Treaty, the EEA competition rules have direct effect and can be invoked by individuals before national courts. Their provisions are to be interpreted in accordance with the judgments of the Court of Justice prior to September 1992.

The EEA Agreement sets upon the EFTA Surveillance Authority the responsibility to administer the agreement's competition rules, although a complex set of jurisdictional provisions exists to delimit cases between the European Commission and the Surveillance Authority<sup>9</sup>.

1 I.e. the Agreement on the European Economic Area (Oporto, 2 May 1992; Cm 2073 (OJ L1, 3.1.94, p 3)) as adjusted by the Protocol (Brussels, 17 March 1993; Cm 2183 (OJ L1, 3.1.94, p 572)) (the 'EEA Agreement'). The agreement was implemented in the United Kingdom by the European Economic Area Act 1993 which came into force on 5 November 1993. The remaining members of EFTA are Norway, Switzerland, Liechtenstein and Iceland.

2 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. As to art 81 see PARA 61 et seq; and as to art 82 see PARA 68 et seq.

3 See the EEA Agreement art 53.

4 See the EEA Agreement art 54.

5 See the EEA Agreement art 57.

6 See the EEA Agreement arts 61-64.

7 See the EEA Agreement art 59.

8 See the EEA Agreement art 56, Protocols 21, 23 and 24 and Annex XIV.

9 See PARA 31.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/37. The Euro-Mediterranean agreements.

### **37. The Euro-Mediterranean agreements.**

The Commission has negotiated agreements with Morocco<sup>1</sup>, Tunisia<sup>2</sup>, Israel<sup>3</sup>, Egypt<sup>4</sup>, Algeria<sup>5</sup>, Lebanon<sup>6</sup>, Jordan<sup>7</sup> and the Palestinian Authority<sup>8</sup>, and is negotiating with Syria.

1 See the Euro-Mediterranean Agreement between the EU and Morocco (OJ L70, 18.3.2000, p 2).

2 See the Euro-Mediterranean Agreement between the EU and Tunisia (OJ L97, 30.3.98, p 2).

3 See the Euro-Mediterranean Agreement between the EU and Israel (OJ L147, 21.06.2000, p 3).

4 See the Euro-Mediterranean Agreement establishing an Association between the EU and Egypt (25 June 2001).

5 See the Euro-Mediterranean Agreement establishing an Association between the EU and Algeria (OJ L265, 10.10.2005, p 2).

6 See the Euro-Mediterranean Association Agreement between the EU and Lebanon (OJ L143, 30.05.2006, p 2).

7 See the Euro-Mediterranean Agreement between the EU and Jordan (OJ L129, 15.5.2002, p 3).

8 See the Euro-Mediterranean Interim Association Agreement between the EU and the West Bank and Gaza Strip (OJ L187, 16.7.97, p 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/38. Partnership and cooperation agreements.

### **38. Partnership and cooperation agreements.**

Partnership and cooperation agreements have been entered into between the European Community and a number of other countries which cover, amongst other matters, restrictions on competition by undertakings, state aid, public undertakings and undertakings with exclusive rights. Such agreements have been entered into with the following countries: Armenia<sup>1</sup>, Azerbaijan<sup>2</sup>, Georgia<sup>3</sup>, Moldova<sup>4</sup> and Ukraine<sup>5</sup>.

- 1 See the Partnership and Cooperation Agreement between the EU and Armenia (OJ L239, 9.9.99, p 3).
- 2 See the Partnership and Cooperation Agreement between the EU and Azerbaijan (OJ L246, 17.9.99, p 1).
- 3 See the Partnership and Cooperation Agreement between the EU and Georgia (OJ L205, 4.8.99, p 3).
- 4 See the Partnership and Cooperation Agreement between the EU and Moldova (OJ L181, 24.6.98, p 3).
- 5 See the Partnership and Cooperation Agreement between the EU and Ukraine (OJ L49, 19.2.98, p 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/39. Stabilisation and association agreements.

### **39. Stabilisation and association agreements.**

Relations between the Western Balkan countries and the European Community are governed by the stabilisation and association process which provides a framework in which the countries progress towards closer association with the EU. This framework, amongst other matters, sets out rights and obligations in areas such as competition and state aid rules. Stabilisation and association agreements have been entered into with the following countries: Albania<sup>1</sup>, Bosnia and Herzegovina<sup>2</sup>, Croatia<sup>3</sup>, the former Yugoslav Republic of Macedonia<sup>4</sup> and Montenegro<sup>5</sup> and negotiations are in process with Serbia.

- 1 Signed on 12 June 2006.
- 2 Signed on 4 December 2007.
- 3 Signed in October 2001.
- 4 Signed in April 2001.
- 5 Signed on 15 October 2007.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/40. Latin and Central American agreements.

### **40. Latin and Central American agreements.**

In Latin and Central America, framework co-operation agreements have been entered into with Mercosur<sup>1</sup>, the Andean Community<sup>2</sup>, Central American Republics<sup>3</sup> and Argentina<sup>4</sup>. The Commission has concluded a global agreement with Mexico<sup>5</sup> and an association agreement with Chile<sup>6</sup>.

1 Mercosur, known as the 'Southern Common Market', was created by the Treaty of Asunción signed by Argentina, Brazil, Paraguay and Uruguay in the Paraguayan capital on 26 March 1991. Chile and Bolivia became associate members in 1996 and 1997 respectively (signed 15 December 1995).

2 OJ C25, 21.1.93. In June 2007 negotiations began on a new agreement which is yet to be concluded.

3 OJ C177, 18.3.93. See also the Political Dialogue and Co-operation Agreement (signed Brussels, 2 October 2003). In 2007 negotiations began on a new agreement which is yet to be concluded.

4 Signed on 2 April 1990 (OJ L295, 26.10.90).

5 See the Economic Partnership, Political Coordination and Cooperation Agreement between the EU and Mexico (OJ L276, 28.10.2000, p 44).

6 See the Association Agreement between the EU and Chile (OJ L352, 30.12.2002, p 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/41. Agreement with South Africa.

#### **41. Agreement with South Africa.**

In 1999 the Commission concluded a free trade agreement containing provisions on competition and state aid with South Africa<sup>1</sup>.

1 See the Agreement on Trade, Development and Cooperation between the EU and South Africa (OJ L311, 4.12.99, p 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/42. Agreements with the United States of America.

#### **42. Agreements with the United States of America.**

In 1991 the Commission concluded a bilateral agreement with the United States of America<sup>1</sup> which was ratified by the Council in 1995 following a decision of the Court of Justice in 1994 that the Commission did not have the competence to enter into the agreement<sup>2</sup>.

The purpose of the agreement is to promote co-operation and co-ordination and lessen the possibility or impact of differences between the United States and the European Community in the application of their competition laws. It has specific provisions in relation to notification, exchange of information and co-operation and co-ordination. The agreement contains provisions on confidentiality, but there remains concern that information passed to United States authorities might be used against European companies.

On 4 June 1998 the Community entered into an agreement with the United States on the application of positive comity principles in the enforcement of their competition laws<sup>3</sup>. This agreement elaborates on the principles of positive comity referred to in the 1991 agreement<sup>4</sup>.



and defines methods for their implementation. Its aim is to enhance the effectiveness of the 1991 agreement in relation to anti-competitive behaviour but it does not apply to mergers.

- 1 See the EU/US Competition Cooperation Agreement (OJ L132, 15.6.95, p 47).
- 2 Case C-327/91 *France v EC Commission* [1994] ECR I-3641, [1994] 5 CMLR 517, ECJ. See further PARA 34.
- 3 See the EU/US Agreement on the application of positive comity principles in the enforcement of their competition laws (OJ L173, 18.6.98, p 28).
- 4 See note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/43. Agreement with Canada.

### **43. Agreement with Canada.**

On 29 April 1999 the Community entered into an agreement with Canada<sup>1</sup> that provides for a framework of co-operation between the competition authorities of the Community and of Canada<sup>2</sup>.

- 1 See the Agreement between the European Communities and the Government of Canada regarding the application of their competition laws (OJ L175, 10.7.99, p 50).
- 2 In an exchange of letters made contemporaneously between the Commission and the Government of Canada, it is made clear that, under the agreement, no information may be provided by the Commission, if it were covered by EC Council Regulation 17 of 6 February 1962 (OJ 1962 p 204 (S Edn 1959-1962 p 87)) art 20, without the consent of the source concerned. Equally, Canada will not provide information under the agreement if it could not have been provided in its absence.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/44. Agreement with Japan.

### **44. Agreement with Japan.**

Cooperation with the Japan Fair Trade Commission is based on the Cooperation Agreement signed in July 2003<sup>1</sup>. The Agreement provides for notification of cases under investigation, coordination of enforcement activities and the exchange of information.

- 1 See the Agreement between the EU and Japan concerning cooperation on anti-competitive activities (OJ L183, 22.7.2003, p 12).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/45. Agreement with the Russian Federation.

#### **45. Agreement with the Russian Federation.**

Relations with the Russian Federation in the field of competition are primarily governed by the terms of the Partnership and Cooperation Agreement between the EU and the Russian Federation, which entered into force in December 1997<sup>1</sup>. The agreement covers restrictions on competition by undertakings, state aid and monopolies of a commercial character.

<sup>1</sup> See the Partnership and Cooperation Agreement between the EU and the Russian Federation (OJ L327, 28.11.97, p 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/46. Effect of agreements.

#### **46. Effect of agreements.**

Most of the bilateral agreements between the Commission and other countries contain competition provisions in almost identical terms providing that the following are incompatible with the proper functioning of such agreements:

- (1) all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;
- (2) abuse by one or more undertakings of a dominant position in the territories of the Community or of the other signatory as a whole or in a substantial part thereof;
- (3) any official aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods<sup>1</sup>.

Their wording is almost identical to that contained in the EC Treaty and in the agreement with Morocco for example, it is provided that:

'. . . any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the rules of Articles [81, 82 and 87] of the [EC Treaty]'<sup>2</sup>.

Given that the described practices are not prohibited but merely 'incompatible with the proper functioning of the agreement'<sup>3</sup>, it is unlikely that these rules would have direct effect.

<sup>1</sup> See eg Euro-Mediterranean Agreement between the EU and Morocco (OJ L70, 18.3.2000, p 2) art 36.

<sup>2</sup> See eg Euro-Mediterranean Agreement between the EU and Morocco (OJ L70, 18.3.2000, p 2) art 36(2).

<sup>3</sup> See eg Euro-Mediterranean Agreement between the EU and Morocco (OJ L70, 18.3.2000, p 2) art 36(1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/A. GEOGRAPHICAL/47. Confidentiality and disclosure.

#### **47. Confidentiality and disclosure.**

One of the major issues of concern with each of the co-operation agreements into which the Community has entered<sup>1</sup> is the question of confidentiality and disclosure or sharing of information between regulators in different jurisdictions whose powers of investigation and inquiry may vary dramatically and whose powers (and those of the courts) to impose penalties, fines and damages vary significantly.

Reference has been made above to the side letters in the agreement with Canada<sup>2</sup> and similar declarations have been made for agreements with the United States of America<sup>3</sup>. However, concern remains that despite such undertakings, information may be passed which could be detrimental to the interests of businesses. This concern was reinforced by the statement made by the Commission in its Report to the Council for the period July to December 1996 on the operation of the agreement between the Community and the United States to the effect that the restriction on exchange of information (that it is confidential) curtails the effectiveness of co-operation and that the Commission was investigating the possibility of overcoming the existing obstacles to the exchange of confidential information.

1 See PARA 40 et seq.

2 See PARA 43.

3 See PARA 42.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/B. FIELD OF APPLICATION/48. Extent of coverage.

### ***B. FIELD OF APPLICATION***

#### **48. Extent of coverage.**

The EC Treaty is applicable to all types and aspects of economic life<sup>1</sup>. It is, however, concerned only with commercial matters. Nonetheless, non profit-making organisations may fall within the scope of the Community rules if parts of their activities are normal business activities; the competition rules are applicable both to the production of goods and to the provision of services<sup>2</sup>. The competition provisions apply to the agreements and behaviour of undertakings<sup>3</sup>, though there are a number exceptions relating to specific fields<sup>4</sup>.

The Treaty provisions apply equally to the activities of professional bodies as any other entity or business form<sup>5</sup>.

1 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 Case 45/85 *Verband der Sachversicherer eV v EC Commission* [1987] ECR 405, [1988] 4 CMLR 264, ECJ; EC Commission Decision 90/22 (*TEKO*) OJ L13, 17.1.90, p 34; EC Commission Decision 90/25 (*Concordato Incendio*) OJ L15, 19.1.90, p 25, [1991] 4 CMLR 199; *Halifax Building Society (Twenty-first Report on Competition Policy 1991*, Annex III, p 335); EC Commission Decision 92/212 (*Eurocheque*) OJ L95, 9.4.92, p 50 (partially annulled on other grounds by Joined Cases T-39, 40/92 *Groupeement des Cartes Bancaires 'CB' v EC Commission* [1994] ECR II-49, CFI); EC Commission Decision 92/521 (*FIFA*) OJ L326, 12.11.92, p 1.

3 See PARA 59.

4 See PARA 49 et seq.

5 Case C-35/96 *EC Commission v Italy* [1998] ECR I-3851, [1998] 5 CMLR 889, ECJ.

On 30 January 1995 the Commission took a decision under the EC Treaty art 81 applying the competition rules against the Colegio Oficial de Agentes de la Propiedad Industrial (Coapi), the professional association of industrial property agents in Spain. All agents practising in Spain are members. Such agents give advice to the public, and assist or represent clients in proceedings involving industrial property rights. The Commission found that the fixing by the general meeting of Coapi of compulsory minimum scales of charges for the cross-border services provided by its members constituted an infringement of the EC Treaty art 81. The Commission confirmed that the national legal framework, within which such agreements or decisions by liberal professions are made, is not relevant to the application of art 81. Even if public authorities encourage such behaviour or delegate to an association of undertakings the power to fix the prices to be applied by its members, the association's exercise of that power does not fall outside the scope of art 81: EC Commission Decision 95/188 (*Colegio Oficial de Agentes de la Propiedad Industria (Coapi)*) OJ L122, 2.6.95, p 35.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/B. FIELD OF APPLICATION/49. Sport.

#### 49. Sport.

In July 1998 the Commission issued guidelines on the application of the Community competition rules to the broadcasting of sports events<sup>1</sup> and in February 1999 it issued its preliminary conclusions on the application of the competition rules to sports<sup>2</sup>. This followed a judgment of the Court of Justice on freedom of movement for professional footballers<sup>3</sup>. In the Commission's opinion, the principles and legitimate objectives recognised in that case would not be impaired by the application of the community competition rules. The compatibility of sporting rules with EC competition law should be examined on a case-by-case basis in order to establish whether the rule breaches EC competition law or not<sup>4</sup>.

1 See *Competition Policy Newsletter (No 2) 1998*. See, however, EC Commission Decision 00/12 (*Comité Français d'Organisation de la Coupe du Monde de Football 1998*) OJ L5, 8.1.2000, p 55, where the Commission imposed a fine of only EUR 1,000 against the French organising committee for the 1998 football world cup following upon a ticket allocation system which favoured applicants with an address in France.

2 EC Commission Press Notice IP (99)133 of 24 February 1999. For a case where the EC Treaty arts 81, 82 were held by the English court to have been infringed in relation to the activities of a professional snooker players' association see *Hendry v World Professional Billiards and Snooker Association* [2001] All ER (D) 71 (Oct). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

3 Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* [1996] All ER (EC) 97, [1995] ECR I-4921, [1996] 1 CMLR 645, ECJ.

4 See Case C-519/04 P *Meca-Medina v EC Commission* [2006] All ER (EC) 1057, [2006] 5 CMLR 1023, ECJ.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/B. FIELD OF APPLICATION/50. Nuclear energy.

## 50. Nuclear energy.

The Euratom Treaty<sup>1</sup> does not contain rules on competition policy or deal with its implementation and, accordingly, agreements between undertakings in or relative to matters affecting the provision of atomic energy and, therefore, within the Euratom Treaty will be dealt with in accordance with the competition rules contained in the EC Treaty<sup>2</sup>.

The EC Commission has announced a series of initiatives relating to energy which are designed to create an open market for electricity and other forms of energy. European Council Directives have now established common rules for the generation, transmission, distribution and supply of electricity<sup>3</sup> and for the internal market in natural gas<sup>4</sup>; and a European Regulation has laid down conditions for access to the network for cross-border exchanges in electricity<sup>5</sup>.

1       Ie the Treaty establishing the European Atomic Energy Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179).

2       EC Commission Decision 76/249 (*KEWA*) OJ L51, 26.2.76, p 15, [1976] 2 CMLR D15; EC Commission Decision 76/248 (*United Reprocessors*) OJ L51, 26.2.76, p 7, [1976] 2 CMLR D1; EC Commission Decision 91/329 (*Scottish Nuclear*) OJ L178, 6.7.91, p 31. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

3       See European Parliament and EC Council Directive 2003/54 (OJ L176, 15.7.2003, p 37) concerning common rules for the internal market in electricity. In the United Kingdom, that Directive is implemented by certain provisions of the Electricity Act 1989 and by the Electricity (Fuel Mix Disclosure) Regulations 2005, SI 2005/391. See **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 653.

4       See European Parliament and EC Council Directive 2003/55 (OJ L176, 15.7.2003, p 57) concerning common rules for the internal market in natural gas. In the United Kingdom, that Directive is implemented by certain provisions of the Gas Acts 1986 and 1995, the Petroleum Act 1998, the Utilities Act 2000 and the Energy Act 2004. See **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 653.

5       See European Parliament and EC Council Regulation 1228/2003 (OJ L176, 15.7.2003, p 1) on conditions for access to the network for cross-border exchanges in electricity. See **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 653.

## UPDATE

### 50 Nuclear energy

NOTE 3--Directive 2003/54 replaced: European Parliament and EC Council Directive 2009/72 (OJ L211, 14.8.2009, p 55).

NOTE 4--Directive 2003/55 replaced: European Parliament and EC Council Directive 2009/73 (OJ L211, 14.8.2009, p 94).

NOTE 5--Regulation 1228/2003 replaced: European Parliament and EC Council Regulation 714/2009 (OJ L211, 14.8.2009, p 15).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/B. FIELD OF APPLICATION/51. Agriculture.

## 51. Agriculture.

Under the EC Treaty, the rules on competition apply to the production of and trade in agricultural products<sup>1</sup> only to the extent determined by the Council within the prescribed framework<sup>2</sup> and in accordance with the procedure laid down therein, account being taken of the objectives of the Common Agricultural Policy<sup>3</sup>. In implementing these provisions, articles 81 to 86 of the Treaty have been declared applicable to the agricultural sector, subject to certain exceptions to the application of article 81<sup>4</sup>.

1 As to agricultural products see the EC Treaty art 32(3), Annex I. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Treaty art 36.

3 EC Treaty art 33. As to the objectives of the Common Agricultural Policy see **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 704.

4 See EC Council Regulation 1184/2006 (OJ L214, 4.8.2006, p 7); EC Council Regulation 1234/2007 (OJ L299, 16.11.2007, p 1); and **AGRICULTURAL PRODUCTION AND MARKETING** vol 1 (2008) PARA 704.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/B. FIELD OF APPLICATION/52. Transport.

## 52. Transport.

In general terms, the competition rules of the EC Treaty<sup>1</sup> apply to the transport sector, by means of regulations enabling the application of articles 81 and 82 to (1) inland transport<sup>2</sup>; (2) maritime transport<sup>3</sup>; and (3) air transport<sup>4</sup>. The procedural rules in the transport sector have been brought into alignment with the general rules of procedure in all sectors by the Modernisation Regulation<sup>5</sup>.

1 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 See EC Council Regulation 1017/68 (OJ Sp Ed, 1968) 302.

3 See EC Council Regulation 1419/2006 (OJ L269, 28.9.2006, p1) which, together with the Modernisation Regulation, removes previous exemptions from the application of competition rules to maritime transport. In 1986 the Council enacted a regulation on unfair pricing practices in maritime transport: see EC Council Regulation 4057/86 (OJ L378, 31.12.86, p 14). See also *Hyundai Merchant Marine Co* [1988] 1 CMLR 389.

4 See EC Council Regulation 411/2004 (OJ L68, 6.3.2004, p1) which, together with the Modernisation Regulation, removes previous exemptions from the application of competition rules to air transport. It should be noted that the Commission's power to enforce competition law applies to all routes, not just those between airports which are within the European Union.

5 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (the 'Modernisation Regulation') (amended by EC Council Regulation 1419/2006 (OJ L269, 28.9.2006, p 1)). The direct applicability of the EC Treaty art 81 to air transport was established by Joined Cases 209-213/84 *Ministère Public v Asjes* [1986] ECR 1425, [1986] 3 CMLR

173, ECJ; Cases 66/86 *Ahmed Saeed Flugreisen and Silver Line Reisbüro GmbH v Zentrale zur Bekämpfung Unlauteren Wettbewerbs eV* [1989] ECR 803, [1990] 4 CMLR 102, ECJ.

## UPDATE

### 52 Transport

NOTE 2--Regulation 1017/68 replaced: EC Council Regulation 169/2009 (OJ L61, 5.3.2009, p 1); references to the repealed regulation should be construed as references to Regulation 169/2009 and read in accordance with the correlation table in Annex II: art 4.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/B. FIELD OF APPLICATION/53. Public undertakings.

### 53. Public undertakings.

According to the EC Treaty, public undertakings are subject to the rules of competition contained in the Treaty, with the exception of undertakings entrusted with the operation of services of general economic interest or having the character of a revenue producing monopoly<sup>1</sup>. In fact, this exception has been very strictly interpreted<sup>2</sup>.

1 EC Treaty art 86. For a case where the application of the EC Treaty art 82 was extended by art 86, which was also infringed see Case C-18/88 *Régie des Télégraphes et des Téléphones (RTT) v GB-Inno-BM-SA* [1991] ECR I-5941, ECJ. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. See also EC Regulation 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road (OJ L315, 3.12.2007, p 1). A public authority is not a public undertaking, and therefore is not subject to the competition rules: see PARA 59.

2 See Case 127/73 *Belgische Radio en Televisie v SV SABAM* [1974] ECR 51, [1974] 2 CMLR 238, ECJ. See also EC Commission Decision 90/456 (*Courier Services in Spain*) OJ L233, 28.8.90, p 19, [1991] 4 CMLR 560; Case T-513/93 *Consiglio Nazionale Degli Spedizionieri Doganali v EC Commission (Associazione Italiana dei Corrieri Aerei Internazionali intervening)* [2000] ECR II-1807, [2000] 3 CMLR 614, CFI (customs agents were 'undertakings'); Case C-475/99 *Ambulanz Glöckner v Landkreis Südwestpfalz* [2001] ECR I-8089, [2002] 4 CMLR 726, ECJ (medical aid organisation entrusted with public ambulance service in Germany).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(ii) Scope of European Competition Law/B. FIELD OF APPLICATION/54. Arbitration.

### 54. Arbitration.

Even if the parties have provided within their agreement for some form of binding arbitration, this will not prevent the application of the rules of articles 81 and 82 of the EC Treaty both to the underlying agreement and to any settlement proposed by the arbiter<sup>1</sup>.

<sup>1</sup> See Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] 2 All ER (Comm) 44, [1999] ECR I-3055, ECJ. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(iii) The Concept of Trade between Member States/55. Introduction.

### **(iii) The Concept of Trade between Member States**

#### **55. Introduction.**

For the EC competition law prohibitions<sup>1</sup> to be invoked the behaviour must have an appreciable effect on trade between member states<sup>2</sup>. Since the entry into force of the Modernisation Regulation<sup>3</sup>, if an agreement or practice has such effect and the application of those articles is therefore established, national competition authorities<sup>4</sup> and national courts must apply those articles in addition to domestic competition law<sup>5</sup>.

The question of whether particular behaviour may affect trade between member states is therefore of first importance, both for establishing whether EC law or domestic law (or both) is to be applied, and for determining which authority is to take action. To that end, the Commission has issued guidelines which set out the basis for answering that question, by reference to the questions of what amounts to 'trade', whether the behaviour in question 'may affect' trade, and whether it does so 'appreciably'<sup>6</sup>.

<sup>1</sup> Ie EC Treaty arts 81, 82. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

<sup>2</sup> See EC Treaty arts 81(1), 82(1).

<sup>3</sup> Ie EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation').

<sup>4</sup> As to the national competition authorities see PARA 29 note 1.

<sup>5</sup> See EC Council Regulation 1/2003 (OJ L1, 4.1.03, p 1) art 3(1). As to that provision, the separation and sharing of competencies between the Commission and national competition authorities and the circumstances to which it does not apply see PARA 29.

<sup>6</sup> See the *Guidelines on inter-state trade* OJ [2004] C101/81.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(iii) The Concept of Trade between Member States/56. Meaning of 'trade'.

#### **56. Meaning of 'trade'.**

The starting point is to determine what the EC Treaty means by 'trade'. The notion is one of more than the purchase and supply of goods; 'trade' encompasses the production and distribution of all types of product, including agricultural products<sup>1</sup>. 'Trade' includes the provision of services of all types, including those of the liberal professions and those provided



by state agencies and nationalised industries (under reservation of the fact that article 31 and/or article 86 of the Treaty may be applicable to these activities<sup>2</sup>). It appears that the notion may not extend to certain aspects of the defence and security industries<sup>3</sup>.

For article 82, the question of whether the abuse of the dominant position which has been found to exist affects trade between member states will be a question of fact to be determined by examination of the whole circumstances of the case.

The reported cases can be divided into two distinct groups; those where restrictive arrangements were found to exist between undertakings established in two or more member states<sup>4</sup>, and those in which the arrangements were between firms in the same member state<sup>5</sup>.

1 As to agricultural products see the EC Treaty art 32(3), and Annex I. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 See PARA 27.

3 See the EC Treaty art 296.

4 See PARA 57.

5 See PARA 58.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(iii) The Concept of Trade between Member States/57. Agreements between undertakings in different member states.

## **57. Agreements between undertakings in different member states.**

It is easier to see that trade is more likely to be affected where restrictive arrangements exist between undertakings established in two or more member states than where such arrangements are between firms in the same member state, but trade may be affected in both cases.

The function of the concept of effect on trade is to determine the field of application of the prohibition of article 81 of the EC Treaty, since there is a possibility that the realisation of a single market between member states will be impeded<sup>1</sup>. It is to the extent that the agreement may affect trade between member states that the interference with competition caused by that agreement is caught by the prohibitions, whilst in the converse case it escapes these prohibitions. For this requirement to be fulfilled it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states<sup>2</sup>.

The fact that an agreement encourages an increase, even a large one, in the volume of trade between states is not sufficient to exclude the possibility that the agreement may 'affect' such trade<sup>3</sup>.

In considering an agreement, it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between member states and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create<sup>4</sup>.

1 Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, [1966] CMLR 357, ECJ. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235 at 249, [1966] CMLR 357 at 375, ECJ.

3 Joined Cases 56, 58/64 *Etablissements Consten SARL and Grundig-Verkaufs-GmbH v EC Commission* [1966] ECR 299 at 341, [1966] CMLR 418 at 472, ECJ (judgment, para 24).

4 Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235 at 249, [1966] CMLR 357 at 375, ECJ.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(iii) The Concept of Trade between Member States/58. Agreements between undertakings in the same member state.

### **58. Agreements between undertakings in the same member state.**

Much of the jurisprudence dealing with agreements between undertakings situated in the same member state concerns the actions of national trade associations. The Commission has considered the practice of rebates calculated on the basis of their total purchases of tiles from German producers; the rebate was cumulative and the wholesalers were, therefore, more likely to purchase their requirements from German producers in order to obtain the most favourable rebate, notwithstanding the fact that imported tiles were, in general, less expensive than German tiles. The Commission considered that such a rebate system was likely to affect trade between member states<sup>1</sup>.

Trade will be 'affected' if, but for the existence of the agreement, decision, concerted practice or abuse of the dominant position, it would have developed in a different way from that in which it actually did.

1 EC Commission Decision 71/23 (*German Ceramic Tiles Discount Agreement*) OJ L10, 13.1.71, p 15, [1971] CMLR D6.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/(iv) 'Undertakings'/59. Breadth of the concept of 'undertaking'.

### **(iv) 'Undertakings'**

#### **59. Breadth of the concept of 'undertaking'.**

For the purposes of Community anti-trust policy, the notion of 'undertaking' means a legal entity - irrespective of how it is financed - which is involved in any form of economic activity that exists in the world of commerce or manufacture<sup>1</sup>. Hence, the sole trader is caught<sup>2</sup> equally by articles 81 and 82 of the EC Treaty as the multi-national corporation (although the sole trader may fall outside the scope of article 82 through the scope of his activities). Competition policy applies to all economic activity, irrespective of the form under which such activity is conducted<sup>3</sup>. Eurocontrol, which manages air traffic control for a number of member states, was

held to exercise prerogatives (control and policing of air space) typical of a public authority. They did not display an economic character justifying the applications of the Treaty's rules on competition<sup>4</sup>.

An entity may be acting as an undertaking in carrying out some functions which amount to economic activity, but not when it is engaged in other functions which do not<sup>5</sup>.

Entities which are in the same corporate group, such as parents and subsidiaries will not be regarded as separate undertakings (even if they have separate legal personality) if they form what may be considered as a single economic entity, so that agreements between them will not attract the application of the competition rules<sup>6</sup>. Similarly it may be possible to take a decision against the parent company of the entity whose activities are in question, or against the parent and subsidiary jointly, or against a subsidiary of the entity in question, or in the case of commercial agency, against the principal<sup>7</sup>.

Certain types of organisation and activities have been excluded from the ambit of the competition rules. Thus an agreement between employers' and employees' representative groups to establish a pension fund was not an 'agreement between undertakings'<sup>8</sup>. However, not all undertakings managing social security systems<sup>9</sup> are excluded from the Treaty rules<sup>10</sup>.

Artistic activities are capable of being economic activities sufficient to establish a finding of 'undertaking' in certain cases<sup>11</sup>.

By virtue of the nature of the Treaty system, the member states themselves cannot be considered to be 'undertakings' within the meaning of articles 81 and 82<sup>12</sup>. This does not mean, however, that where the member states perform commercial activities through commercial or statutory monopolies, or through governmental or other types of national agency, these organisations will not fall under articles 81 and 82<sup>13</sup>.

An employee is not usually considered as an 'undertaking' as he is usually acting on behalf of an undertaking<sup>14</sup>. However, he may become an undertaking if he ceases to pursue the interests of his employer and begins to pursue his own interests<sup>15</sup>.

1 Case C-41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I-1979, [1993] 4 CMLR 306, ECJ; EC Commission Decision 92/51 (*1990 World Cup Package Tours*) OJ L326, 12.11.92, p 31. It is the activity of offering goods and services in a given market, rather than the business of purchasing, which is the characteristic feature of an economic activity: Case T-319/99 *Federación Nacional de Empresas de Instrumentación Científica, Médica, Técnica y Dental (FENIN) v EC Commission* [2004] All ER (EC) 300, [2003] ECR II-357, CFI. Any activity consisting in offering goods or services on a given market is an economic activity: see Cases C-180/98 to C-184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451, [2001] 4 CMLR 30, [2000] All ER (D) 1192, ECJ, at para 75. See also Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] All ER (EC) 193, [2002] ECR I-1577, [2002] 4 CMLR 913.

2 EC Commission Decision 76/29 (*AOIP/Beyrand*) OJ L6, 13.1.76, p 8, [1976] 1 CMLR D14; EC Commission Decision 76/743 (*Reuter/BASF*) OJ L254, 17.9.76, p 40, [1976] 2 CMLR D44; EC Commission Decision 79/86 (*Vaessen/Moris*) OJ L19, 26.1.79, p 32, [1979] 1 CMLR 511; EC Commission Decision 78/516 (*RAI/UNITEL*) OJ L157, 15.6.78, p 39, [1978] 3 CMLR 306; EC Commission Decision 82/897 (*Totecs/Dorcet*) OJ L379, 31.12.82, p 19, [1983] 1 CMLR 412; EC Commission Decision 83/670 (*Nutricia/de Rooij/Zuid-Hollandse Conservenfabriek*) OJ L376, 31.12.83, p 22, [1984] 2 CMLR 165.

3 For an example of a non-profit-making association see EC Commission Decision 90/25 (*Concordato Incendio*) OJ L15, 19.1.90, p 25, [1991] 4 CMLR 199. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

4 Case C-364/92 *SAT Fluggesellschaft mbH v Eurocontrol* [1994] ECR I-43, [1994] 5 CMLR 208, ECJ. See also note 5.

5 See Case T-155/04 *SELEX Sistemi Integrati SpA v EC Commission (Eurocontrol intervening)* [2006] ECR II-4797, [2007] 4 CMLR 372, CFI. The decision was upheld on appeal: Case C-113/07 P *SELEX Sistemi Integrati SpA v EC Commission (Eurocontrol intervening)* [2009] All ER (D) 294 (Mar), ECJ, but the Court of Justice stated that the Court of First Instance had erred in law in deciding that the activities of Eurocontrol under consideration were separable and therefore capable of being economic activity such as to attract the application of the EC Treaty.

6 See eg Case 22/71 *Béguelin Import v GL Import Export* [1971] ECR 949, [1972] CMLR 81, ECJ; Case C-30/87 *Bodson v SA des Pompes Funèbres des Régions Libérées* [1988] ECR 2479, [1989] 4 CMLR 984, ECJ; Case T-102/92 *Viho Europe BV v EC Commission (Parker Pen Ltd intervening)* [1995] ECR-II 17, [1995] 4 CMLR 299, CFI.

7 See eg EC Commission Decision 70/332 (*Kodak*) OJ L147, 7.7.70, p 24, [1970] CMLR D19.

8 See Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Texielindustrie* [1999] ECR I-5751, [2000] 4 CMLR 446, ECJ.

9 Joined Cases C-159, 160/91 *Poucet v Assurances Générales de France et Caisse Mutuelle Régionale du Languedoc-Rousillon* [1993] ECR I-637, ECJ. See Joined Cases C-264/01, 306/01, 354/01, 355/01 AOK *Bundesverband v Ichthyol-gesellschaft Cordes, Hermanu & Co* [2004] ECR I-2493, [2004] 4 CMLR 1261, ECJ (non-profit-making public law body which fulfilled exclusively social function was not an undertaking).

10 Case C-244/94 *Fédération Française des Sociétés d'Assurance v Caisse Nationale d'Assurance Vieillesse Mutuelle Agricole* [1995] ECR I-4013, [1996] 4 CMLR 536, ECJ. See also Joined Cases C-264/01, 306/01, 354/01, 355/01 AOK *Bundesverband v Ichthyol-gesellschaft Cordes, Hermanu & Co* [2004] ECR I-2493, [2004] 4 CMLR 1261, ECJ.

11 EC Commission Decision 78/516 (*RAI/UNITEL*) OJ L157, 15.6.78, p 39, [1978] 3 CMLR 306.

12 See, however, *French State/Suralmo (Ninth Report on Competition Policy 1980*, point 114) where the Commission considered a patent licence granted by France as falling within the EC Treaty art 81(1).

13 The position of local and regional authorities is probably to be assimilated to that of member states: see Case C-30/87 *Bodson v SA des Pompes Funèbres des Régions Libérées* [1988] ECR 2479, [1989] 4 CMLR 984, ECJ. However, note that under the EC Treaty art 86(2), arts 81 and 82 may be disapplied if they would obstruct the performance of the functions entrusted to the entity in question. See further EC Commission Decision 90/16 (*Express Delivery Services in the Netherlands*) OJ L10, 12.1.90, p 47. This decision was subsequently annulled: see Joined Cases C-48, 66/90 *Netherlands v EC Commission* [1992] ECR I-565, [1993] 5 CMLR 316, ECJ; Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, ECJ.

14 Joined Cases 40-48/73, 50/73, 54-56/73, 111/73, 113-114/73 *Coöperative vereniging Suiker Unie UA v EC Commission* [1975] ECR 1663, [1976] 1 CMLR 295, ECJ.

15 EC Commission Decision 76/743 (*Reuter/BASF*), OJ L254, 17.9.76, p 40, [1976] 2 CMLR D44.

## UPDATE

### 59 Breadth of the concept of 'undertaking'

NOTE 10--See also Case C-350/07 *Kattner Stahlbau GmbH v Maschinenbau- und Metall-Berufsgenossenschaft* [2009] 2 CMLR 1339, [2009] All ER (D) 63 (Mar), ECJ (employers' liability insurance association not undertaking as fulfilled purely social function).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(2) COMMON PRINCIPLES/ (v) The Interaction between Articles 81 and 82/60. Overlap.

## (v) The Interaction between Articles 81 and 82

### 60. Overlap.

Although articles 81 and 82 of the EC Treaty are intended to cover different types of anti-competitive activity, there is an inevitable overlap between the two provisions. The Court of Justice has stated that the two articles cannot be interpreted in such a way as to contradict

each other because they serve to achieve the same aim<sup>1</sup>. In this connection, it is important to have regard to the provision of the Treaty which provides for the institution of a system ensuring that competition in the common market is not distorted<sup>2</sup>.

1 Case 6/72 *Europemballage Corp and Continental Can Co Inc v EC Commission* [1973] ECR 215, [1973] CMLR 199, ECJ. See also PARAS 26, 73.

2 I.e. the EC Treaty art 3(g); see PARA 26. As to the EC Treaty (i.e. the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION/(i) The Prohibition/61. Agreements between undertakings.

### **(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION**

#### **(i) The Prohibition**

##### **61. Agreements between undertakings.**

Agreements between undertakings which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited<sup>1</sup>; however, where they affect trade within a member state, without affecting trade between member states, they are likely to violate the domestic law of that state. The form of the agreement is irrelevant; a 'gentleman's agreement' is caught equally with a formally executed contract<sup>2</sup>. It is not relevant to this analysis whether the agreement is between undertakings at the same level on the market (horizontal), or between undertakings at different levels of the market (vertical)<sup>3</sup>.

There are no procedural requirements with which an 'agreement' must comply to fall within the meaning of this prohibition. The requirement is merely that the 'agreement' creates rights and obligations between the parties which are capable of enforcement, either by the parties or by some external agency<sup>4</sup>. The fact that one party refuses to sign an undertaking of compliance with a set of rules does not make that set of rules any less an agreement between the issuer of the rules and that latter party if, as a matter of fact, the party refusing to sign carries on his business in a way which would comply with the rules<sup>5</sup>. Where a wholesaler in one member state consents to stop supplying retailers in another member state under strong pressure from a manufacturer, an agreement is constituted notwithstanding that it is against the economic interest of the wholesaler to do so<sup>6</sup>. The Court of Justice has held that the Commission was entitled to treat the common intentions existing between producers both as an agreement between the parties and as concerted practices<sup>7</sup>. Even if an agreement ceases to be in force, it can be caught by the prohibition if it continues to produce effects.

Standard conditions of sale can constitute an agreement between the seller and buyers<sup>8</sup>; however, a unilateral act by a seller probably will not<sup>9</sup>.

An agreement between two associations of undertakings falls within the ambit of the prohibition<sup>10</sup> even if the associations are not themselves in a position to compel the enforcement of the obligations contained in the agreement, but have to rely on their constituent undertakings to discharge the obligations incumbent upon the associations<sup>11</sup>.

Whilst substantive restrictive practices legislation, particularly the EC Treaty articles 81 and 82, is addressed to undertakings, the question to be considered is the extent to which agreements

and concerted practices between legally distinct and separate entities which are economically inter-related, or inter-dependent are to be considered as qualifying for examination under the anti-trust rules<sup>12</sup>.

For the intra-undertaking arrangement, rather than the inter-undertaking arrangement, the question is inter alia to whom can the prohibited behaviour in question be imputed? The fact that a subsidiary has a separate legal personality, distinct from that of its parent, is not sufficient to remove the possibility that the behaviour of the subsidiary may be imputed to the parent company<sup>13</sup>. This will be the case where, as a matter of fact, it is established that the subsidiary does not have a distinct autonomous commercial policy, separate from the policy of the parent company<sup>14</sup>. It is when this sufficiency of autonomous behaviour is found lacking that the prohibition may be considered inapplicable to the parent-subsidiary relationship, in that they form a single economic entity<sup>15</sup>. In dismissing a challenge to a decision of the Court of First Instance, the Court of Justice has held that the prohibition does not apply to agreements between companies which are members of the same group<sup>16</sup>. However, the distinction between an agreement caught by the prohibition and an agreement falling outside it is not clear-cut: there is scope for divergence of opinion on whether a particular arrangement falls under the Treaty provision. Even where producers 'form one indivisible system of public supply', this does not mean they form a single economic unit<sup>17</sup>.

1 EC Treaty art 81(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 Case 41/69 *ACF Chemiefarma NV v EC Commission* [1970] ECR 661, ECJ (Quinine Cartel). See also Case 56/89R *Publishers Association v EC Commission* [1989] 2 All ER 1059, [1989] ECR 1693, ECJ. As soon as it is apparent that the object of an agreement is the prevention, restriction or distortion of competition, the actual effect of the agreement is irrelevant: Case T-395/94 *Atlantic Container Line AB (supported by the European Community Shipowners' Association ASBL, interveners) v EC Commission (supported by Freight Transport Association Ltd, interveners)* [2002] 2 All ER (Comm) 572, [2002] All ER (EC) 684, CFI.

3 As to decisions by associations of undertakings see PARA 62.

4 Case 41/69 *ACF Chemiefarma NV v EC Commission* [1970] ECR 661, ECJ. See EC Commission Decision 96/478 (*Bayer AG/Adalat*) OJ L201, 10.1.96, p 1).

5 EC Commission Decision 88/86 (*Fisher Price/Quaker Oats*) OJ L49, 23.2.88, p 34, [1989] 4 CMLR 553.

6 EC Commission Decision 92/426 (*Vihol/Parker Pen*) OJ L233, 15.8.92, p 27.

7 Joined Cases T-1-4, 6-15/89 *Rhône-Poulenc v EC Commission* [1991] ECR II-867, CFI. As to concerted practices see PARA 63.

8 EC Commission Decision 78/163 (*Distillers Co Ltd, Conditions of Sale*) OJ L50, 22.2.78, p 16, [1978] 1 CMLR 400; EC Commission Decision 70/332 (*Kodak*) OJ L147, 7.7.70, p 24, [1970] CMLR D19; EC Commission Decision 87/409 (*Sandoz*) OJ L222, 10.8.87, p 28, [1989] 4 CMLR 628.

9 Joined Cases 25, 26/84 *Ford-Werke AG and Ford of Europe Inc v EC Commission* [1985] ECR 2725, [1985] 3 CMLR 528, ECJ. Signature of a lawful dealership contract does not in itself constitute acquiescence to a later unlawful variation of the contract; the variation is not necessarily, therefore, an agreement: Case T-208/01 *Volkswagen AG v EC Commission* [2004] All ER (EC) 674, [2004] ICR 1197, CFI.

10 EC Commission Decision 69/90 (*European Machine Tool Exhibitions (Cecimo)*) OJ L69, 20.3.69, p 13, [1969] CMLR D1; EC Commission Decision 71/337 (*CEMATEx*) OJ L227, 8.10.71, p 26, [1973] CMLR D135; EC Commission Decision 82/371 (*Navewa-Anseau*) OJ L167, 15.6.82, p 39, [1982] 2 CMLR 193 (amended by OJ L325, 20.11.82, p 20). See also Cases T-217/03 and T245/03 *Federation Nationale de la Cooperation Betail and Viande v EC Commission* [2008] 5 CMLR 406.

11 Joined Cases T-1-4, 6-15/89 *Rhône-Poulenc v EC Commission* [1991] ECR II-867, CFI.

12 Case 243/83 *Binon et Cie SA v SA Agence et messageries de la presse* [1985] ECR 2015, [1985] 3 CMLR 800, ECJ.

13 Joined Cases 209-215, 218/78 *Heintz van Landewyck Sàrl v EC Commission* [1980] ECR 3125, [1981] 3 CMLR 134, ECJ. For a consideration of the position where companies cease to be parent and subsidiary see EC Commission Decision 88/84 (*ARG/Unipart*) OJ L45, 18.2.88, p 34, [1988] 4 CMLR 513.

14 EC Commission Decision 85/74 (*Peroxygen Products*) OJ L35, 7.2.85, p 1, [1985] CMLR 481.

15 EC Commission Decision 70/332 (*Kodak*) OJ L147, 7.7.70, p 24, [1970] CMLR D19; EC Commission Decision 69/165 (*Christiani & Nielsen*) OJ L165, 5.7.69, p 12, [1969] CMLR D36.

16 Case C-73/95P *Viho Europe BV v EC Commission* [1997] All ER (EC) 163, [1996] ECR I-5457, [1997] 4 CMLR 419, ECJ.

17 EC Commission Decision 91/50 (*Ijsselcentrale*) OJ L28, 2.2.91, p 32.

One area of doubt is that of commercial agency, more particularly the overlap between commercial agency (which falls outside the prohibition: see EC Commission Notice (OJ 139, 24.12.62, p 2921)) and the role of the independent trader (which falls within it). Commercial agents exercise no entrepreneurial activity independent of that of their principal; thus, their position is similar to that of the subsidiary discussed above, in that the relations between them and their principal will probably fall outside the scope of the EC Treaty art 81. As to commercial agency see **AGENCY** vol 1 (2008) PARA 72.

## UPDATE

### 61 Agreements between undertakings

NOTE 13--Before attaching liability to a legal entity which is part of an undertaking and has implemented an offending agreement, there is no need to allege and prove that the legal entity had knowledge of the agreement; it is sufficient that the undertaking has such knowledge. *Cooper Tire and Rubber Co v Shell Chemicals UK Ltd* [2009] EWHC 2609 (Comm), [2009] All ER (D) 16 (Nov).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION/(i) The Prohibition/62. Decisions by associations of undertakings.

### 62. Decisions by associations of undertakings.

Decisions by associations of undertakings which may affect trade between member states, and which have as their object or effect the prevention, restriction or distortion of competition within the common market, are prohibited<sup>1</sup>.

The aim is to ensure that undertakings on the market cannot co-ordinate their behaviour with a view to preventing the interplay of free competition. It would be anomalous if undertakings who were unable to co-ordinate their behaviour through restrictive agreements, could do so by entrusting their decision-making in a particular sphere to an association, which could take decisions which would be binding and enforceable against the members of the association<sup>2</sup>.

It is not necessary that the association have any particular legal form<sup>3</sup> or, indeed, that it be entitled to any form of legal personality under the relevant national law. It suffices for these purposes that an association exists and has power to take decisions, although such decisions may be reached on an ad hoc basis<sup>4</sup>. The prohibition does not affect the existence of the association as such; it is only its activities with which the authorities are concerned. The Commission has condemned the activities of an association of associations<sup>5</sup>.

The decision itself is not required to have any special form. If the association prepares a set of rules or conditions which are adopted as standard terms and conditions by the undertakings

which are members of the association, these rules or conditions will be considered as 'decisions' equally with a formal decision or instruction issued to the members of the association<sup>6</sup>. The decision need not be expressed as 'binding' upon the members of the association; the instrument may be merely a recommendation<sup>7</sup> or a suggestion, provided that it can be shown that the members of the association, in fact, always observe such a recommendation or suggestion as if it were in a binding form<sup>8</sup>.

1 EC Treaty art 81(1). This is a logical extension of the prohibition of agreements between undertakings: see PARA 61. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Commission Decision 93/174 (*International Union of Railways*) OJ L73, 26.3.93, p 38.

3 EC Commission Decision 85/76 (*Milchforderungsfonds*) OJ L35, 7.2.85, p 35, [1985] 3 CMLR 101.

4 EC Commission Decision 69/90 (*European Machine Tool Exhibitions (Cecimo)*) OJ L69, 20.3.69, p 13, [1969] CMLR D1.

5 See EC Commission Decision 92/204 (*Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid*) OJ L92, 7.4.92, p 1.

6 See eg EC Commission Decision 86/499 (*VIFKA*) (OJ L291, 15.10.86 p 46); Case 45/85 *Verband der Sachversicherer eV v EC Commission* [1987] ECR 405, [1988] 4 CMLR 264, ECJ. As to the rules and regulations of a self-regulatory organisation see EC Commission Decisions 85/563--85/566 (OJ L369, 31.12.85 pp 25-34) (*Applications of the London Sugar Futures Market, Cocoa Terminal Market, Rubber Market and Coffee Market*) [1988] 4 CMLR 138-155. A provision made by a national Bar association in order to regulate partnerships between the legal profession and other professions is a decision taken by an association of undertakings for the purposes of the EC Treaty art 81(1): Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap interveniend)* [2002] All ER (EC) 193, [2002] ECR I-1577, ECJ.

7 Joined Cases 96-102, 104, 105, 108, 110/82 *IAZ International Belgium NV v EC Commission* [1983] ECR 3369, [1984] 3 CMLR 276, ECJ.

8 Case 8/72 *Vereniging van Cementhandelaren v EC Commission* 1972] ECR 977, [1973] CMLR 7, ECJ; Case 45/85 *Verband der Sachversicherer eV v EC Commission* [1987] ECR 405, [1988] 4 CMLR 264, ECJ; EC Commission Decision 96/438 (*Fenex*) OJ L181, 20.7.96, p 28.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION/(i) The Prohibition/63. Concerted practices.

### 63. Concerted practices.

Also prohibited are concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market<sup>1</sup>. What is required to base a finding of 'concerted practice' is some form of 'agreement' or understanding between the parties; this agreement involves something less than a gentleman's agreement. Irrespective of the type of 'meeting of the minds', each known and wanted co-operation between the parties must be seen as a form of concerted practice<sup>2</sup>. An infringement of article 81 of the EC Treaty may exist where the parties have not set out their understanding but some form of acceptance from each party as to conduct can be inferred<sup>3</sup>. Mere parallelism of behaviour is not sufficient, per se, to permit the supposition of concerted practice. A recommendation does not necessarily represent a type of concerted practice, but a followed recommendation may lead thereto<sup>4</sup>. In this latter case, the supposition



of concerted practice can only be based on the uniform conduct of the parties, if there is the necessary mutual understanding.

The Court of Justice has described the concept of a concerted practice as 'a form of co-ordination between undertakings, which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition, practical co-operation between them which leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the importance and number of the undertakings as well as the size and nature of the said market. Such practical co-operation amounts to a concerted practice, particularly if it enables the persons concerned to consolidate established positions to the detriment of effective freedom of movement of the products in the common market and of the freedom of consumers to choose their suppliers'<sup>5</sup>.

The Court of Justice expressly rejected the submission that the existence of a concerted practice requires the existence of some form of plan between the parties<sup>6</sup>; the essential requirement of Community competition policy is that each trader must set his policy independently of that policy decided upon by his competitors. Although this requirement in no way removes the ability of each firm to adapt its policy intelligently to the way its competitors are behaving, it completely prohibits any contact, direct or indirect, between traders where the object or effect of such contact is to influence the market conduct of either party or to reveal to him market policy or intentions<sup>7</sup>.

The Court of Justice has held that the inference by the Commission of concertation from simultaneity of price announcements and the fact that prices were identical was incorrect; such parallel conduct could only be regarded as furnishing proof of concertation if it were the only plausible explanation for such conduct<sup>8</sup>.

The Commission has to establish that each participant in a concerted practice participated in the acts which constituted the infringement; each undertaking is liable only to the extent of its participation<sup>9</sup>.

Whilst generally, if concertation is established, it will follow that anti-competitive effects will ensue, it is possible for the parties to seek to rebut such a presumption<sup>10</sup>.

A unilateral declaration as to future pricing policy is capable of constituting concerted behaviour<sup>11</sup>.

1 EC Treaty art 81(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 Case 48/69 *ICI Ltd v EC Commission* [1972] ECR 619 at 653, 654, [1972] CMLR 557 at 621, 622, ECJ (judgment, paras 51-63).

3 EC Commission Decision 89/93 (*Italian Flat Glass*) OJ L33, 4.2.89, p 44, [1990] 4 CMLR 535; EC Commission Decision 89/190 (*PVC*) OJ L74, 17.3.89, p 1, [1990] 4 CMLR 345; EC Commission Decision 91/299 (*Soda-Ash-Solvay*) OJ L152 15.6.91, p 21.

4 EC Commission Decision 78/760 (*Belgian Tobacco Cartel (Fedetab)*) OJ L224, 15.8.78, p 29, [1978] 3 CMLR 524.

5 Joined Cases 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v EC Commission* [1975] ECR 1663 at 1916, [1976] 1 CMLR 295 at 405, ECJ (judgment, para 26).

6 Joined Cases 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v EC Commission* [1975] ECR 1663 at 1941-1945, [1976] 1 CMLR 295 at 167-192, ECJ (judgment, paras 167-192).

7 EC Commission Decision 86/398 (*Polypropylene*) OJ L230, 18.8.86, p 1, [1988] 4 CMLR 347.

8 Joined Cases 89, 104, 116, 117, 125-129/85 *Ahlström Osakeyhtiö v EC Commission* [1988] ECR 5193, [1988] 4 CMLR 901, ECJ. See also Joined Cases 100-103/80 *Musique Diffusion Française SA v EC Commission* [1983] ECR 1825, [1983] 3 CMLR 221, ECJ.

9 In Joined Cases T-1-4, 6-15/89 *SA Rhône-Poulenc v EC Commission* [1991] ECR II-867, CFI (the Polypropylene case), the Court of First Instance refused to accept collective responsibility as a principle.

10 Case T-41/96 *Bayer AG v EC Commission* [2001] All ER (EC) 1, [2000] ECR II-3383, CFI. In a ruling by the President of the court in that case it appears to be suggested that where there was no written evidence of an agreement to ban exports nor other evidence to suggest that Bayer's wholesalers perceived refusals to supply large orders as sanctions or penalties for not observing an export ban, there was no agreement or concerted practice falling within the EC Treaty art 81(1). In a later decision in 1996, the Commission imposed a fine of ECU 3 million on Bayer for imposing an export ban on a range of medicinal preparations from France and Spain to the United Kingdom: EC Commission Decision 96/478 (*Bayer*) OJ L201, 9.8.96, p 1. As to fines see PARA 107 et seq.

11 Joined Cases T-202, 204, 207/98 *Tate & Lyle plc v EC Commission* [2001] All ER (EC) 839, [2001] ECR II-2035, CFI.

## UPDATE

### 63 Concerted practices

NOTE 5--See also C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2010] Bus LR 158, [2009] All ER (D) 60 (Jun), ECJ (presumption of causal connection between concerted practice and conduct of undertaking on market, even if concerted action result of single meeting).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION/(i) The Prohibition/64. The 'De minimis' rule.

### 64. The 'De minimis' rule.

In 2001 the Commission issued a notice<sup>1</sup> (replacing the notice of 1997<sup>2</sup>) dealing with agreements of minor importance which do not fall under the prohibition contained in article 81 of the EC Treaty<sup>3</sup>. This so-called 'De minimis' notice states that 'this provision is not applicable where the impact of the agreement on intra-Community trade or on competition is not appreciable'. It is acknowledged that agreements between small and medium-sized undertakings<sup>4</sup> are rarely capable of appreciably affecting trade between member states<sup>5</sup>.

The Commission holds the view that agreements between undertakings which affect trade between member states do not appreciably restrict competition:

- (1) if the aggregate market share held by the parties to the agreement does not exceed 10 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of these markets (agreements between competitors)<sup>6</sup>; or
- (2) if the market share held by each of the parties to the agreement does not exceed 15 per cent on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of these markets (agreements between non-competitors)<sup>7</sup>.

In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10 per cent threshold is applicable<sup>8</sup>. Where there are parallel networks of agreements, the market share threshold is 5 per cent<sup>9</sup>.

The notice does not apply to price-fixing or market-sharing agreements and, irrespective of market shares, such agreements will always be prohibited<sup>10</sup>.

It has been considered by the Commission that contracts by a brewery with less than 1 per cent of the national market and producing less than 4.4 million gallons of beer per annum limiting supply contracts to 15 years will be considered of minor importance<sup>11</sup>.

In cases covered by the notice the Commission will not institute proceedings either upon application or on its own initiative. Where undertakings assume in good faith that an agreement is covered by the notice, the Commission will not impose fines. Although not binding on them, the notice is intended to give guidance to the courts and authorities of the member states in their application of article 81<sup>12</sup>.

1       Ie EC Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.2001, p 13).

2       See EC Commission Notice of December 1997 concerning Agreements of Minor Importance (OJ C372, 9.12.97, p 13).

3       Ie the EC Treaty art 81(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

4       Ie enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million: see EC Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ L124, 20.5.2003, p 36).

5       EC Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.2001, p 13) Pt I para 3.

6       See Commission notice *Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements* (OJ C3, 6.1.2001, para 9).

7       EC Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.2001, p 13) Pt II para 7.

8       EC Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.2001, p 13) Pt II para 7.

9       EC Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.2001, p 13) Pt II para 8.

10       These are the so-called 'hardcore restrictions': see EC Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.2001, p 13) Pt II para 11.

11       OJ 1992, C121/2.

12       EC Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis) (OJ C368, 22.12.2001, p 13) Pt I para 4.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION/(ii) Nullity/65. Automatic nullity.

## **(ii) Nullity**

### **65. Automatic nullity.**

Any agreement falling within the prohibition contained in article 81 of the EC Treaty<sup>1</sup> is automatically void<sup>2</sup>. The Court of Justice has held that this provision renders agreements and decisions prohibited pursuant thereto automatically void and such nullity is therefore capable of having a bearing on all the effects, either past or future, of the agreement or decision. Consequently, the nullity provided for is of retrospective effect<sup>3</sup>.

Where voidness follows from an infringement of art 81 of the EC Treaty, it is possible to sever the offending provisions of the contract from the rest of its terms<sup>4</sup> in accordance with the domestic law of each member state<sup>5</sup>.

However, the courts have not been sympathetic to attempts to use the provisions of competition law to avoid contractual obligations<sup>6</sup>.

1       Ie the EC Treaty art 81(1): see PARAS 61-64. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2       EC Treaty art 81(2). See Case C-126/97 *Eco Swiss China Time Ltd v Benetton International NV* [1999] ECR I-3055, [2000] 5 CMLR 816.

3       Case 48/72 *Brasserie de Haecht SA v Wilkin-Janssen* [1973] ECR 77, [1973] CMLR 287, ECJ. In that case, the Court of Justice was asked whether the nullity of agreements exempted from notification was deemed to take effect from the date when one of the contracting parties brought proceedings for nullity or merely from the date of the judgment of the court or decision of the Commission which established it. It should be noted that the nullity cannot have effect prior to 1 January 1958.

4       See Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1966] ECR 235, [1966] CMLR 357.

5       See Case 319/82 *Société de Vente de Ciments et Betons de L'Est SA v Kerpen and Kerpen GmbH & Co KG* [1983] ECR 4173, [1985] 1 CMLR 511, ECJ. The English courts have dealt with this issue in eg *Chemidus Wavin Ltd v Société pour la Transformation et l'Exploitation des Résines Industrielles SA* [1978] 3 CMLR 514, [1977] FSR 181, CA; *Inntrepreneur Estates Ltd v Mason* [1993] 2 CMLR 293, [1993] 2 EGLR 189.

6       See *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142, [1994] 1 All ER 755; *Lloyd's v Clementson* [1995] 1 CMLR 693, [1995] 43 LS Gaz R 26; *Marchant & Eliot Underwriting Ltd v Higgins* [1996] 1 Lloyd's Rep 313 (affd [1996] 3 CMLR 349, [1996] 2 Lloyd's Rep 31, CA).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION/(iii) Exemption/66. Individual exemption.

## **(iii) Exemption**

### **66. Individual exemption.**

The EC Treaty provides that the prohibition contained in article 81 may be declared inapplicable in certain circumstances<sup>1</sup> and contains two positive conditions, satisfaction of which enable it to be invoked, and two negative conditions, which must not be found for exemption to be granted.

The two positive conditions, at least one of which must be satisfied, are:

- (1) the improvement of the production or distribution of goods; and
- (2) the promotion of technical and economic progress<sup>2</sup>.

In addition, in both cases, the agreement, decision or concerted practice must allow consumers a fair share of the resultant benefit<sup>3</sup>. The Commission seems to interpret this as meaning lower prices (as opposed to other less measurable benefits)<sup>4</sup>. The arrangement must satisfy two negative criteria, namely:

- (a) it must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of the positive objective stated above (and this means that there is no less restrictive means of achieving the same object)<sup>5</sup>; and
- (b) it must not afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question<sup>6</sup>.

These negative criteria are not alternatives and each must be absolute. The rules for exemptions are stated in the Treaty and procedural provisions are contained in the Modernisation Regulation<sup>7</sup>.

The Modernisation Regulation removed the system of notification for individual exemptions as from 1 May 2004. Prior to this, the Commission was inundated with agreements awaiting exemption which resulted in long delays for the undertakings concerned and also diverted the resources of the Commission from curbing more serious infringements of competition law<sup>8</sup>. The Modernisation Regulation introduced the system of self-assessment of the application of article 81 with the onus now on undertakings to ensure compliance<sup>9</sup>.

1 EC Treaty art 81(3). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. As to the prohibition and the automatic nullity of agreements, decisions and practices which infringe it see art 81(1), (2); and PARAS 61, 65.

2 EC Treaty art 81(3).

3 EC Treaty art 81(3).

4 EC Commission Decision 82/123 (*VBBB/VBVB*) OJ L54, 25.2.82, p 36, [1982] 2 CMLR 344.

5 EC Treaty art 81(3)(a). See eg EC Commission Decision 76/172 (*Bayer/Gist-Brocades*) OJ L30, 5.2.76 p 13, [1976] 1 CMLR D98; EC Commission Decision 86/405 (*Optical Fibres*) OJ L236, 22.8.86 p 30; EC Commission Decision 93/126 (*Jahrhundertvertrag*) OJ L50, 2.3.93, p 14.

6 EC Treaty art 81(3)(b). See eg EC Commission Decision 84/381 (*Carlsberg*) OJ L207, 2.8.84, p 26, [1985] 1 CMLR 735.

7 Ie EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation').

8 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) recital 3.

9 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(3) PREVENTION, RESTRICTION OR DISTORTION OF COMPETITION/(iii) Exemption/67. Group exemption.

## **67. Group exemption.**

From the start of 1963, when the Commission was processing the many thousands of notifications and requests for negative clearances which had been sent to it<sup>1</sup>, it appeared to it that the best way to deal with these notifications, most of which dealt with the same legal problems, would be by way of a block exemption covering all agreements of a particular type, provided that certain stated criteria were met.

The method of such exemption was to be that an enabling regulation was to be passed by the Council allowing the Commission, after it had gained sufficient expertise and experience through the examination of particular cases and the issue of individual decisions, to state what provisions could be permitted and exemptions granted, and thereafter to issue an exemption regulation covering a particular type of agreement. Such regulations of the Council and of the Commission rest solely on articles 81 and 83 of the EC Treaty<sup>2</sup> and therefore must follow the procedure laid down in those articles.

The EC Council has provided that any exempting regulation adopted by the Commission should define the categories of agreement to which the exemption applied, and in particular should specify restrictions or clauses which must not appear in the agreement and those conditions which must be contained in the agreement or other conditions which must be satisfied for the exemption to be available. The exemption was to be for a specific period and it was to be available retrospectively to agreements in respect of which the parties had amended the provisions within three months of the Commission regulation so that the agreement would comply with the requirements for exemption under its provisions<sup>3</sup>.

Group exemptions have been made available to vertical agreements in general<sup>4</sup>, including concerted practices<sup>5</sup> and motor vehicles<sup>6</sup>. Group exemptions have also been made available to horizontal agreements<sup>7</sup>, including specialisation agreements<sup>8</sup> and research and development agreements<sup>9</sup>. Licensing agreements for the transfer of technology are also the subject of a group exemption<sup>10</sup>.

A regulation in the maritime sector<sup>11</sup> in relation to consortium agreements in cargo liner shipping was enacted in 1995 and renewed in 2000<sup>12</sup> and in May 1996 the Commission authorised a series of consortium agreements<sup>13</sup> under that regulation. Although the Commission has power to publish block exemptions in the air transport sector<sup>14</sup>, none are currently in force<sup>15</sup>.

1       Ie under EC Council Regulation 17 of 6 February 1962 (OJ 1962 p 204 (S Edn 1959-62 p 87)). See now EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation').

2       See PARA 61 et seq. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

3       EC Council Regulation 19/65 (OJ L36, 6.3.65, p 533 (S Edn 1965-66 p 35)). See also note 1. See also EC Council Regulation 1215/1999 (OJ L148, 15.6.99, p 1).

4       See EC Council Regulation 19/65 (OJ L36, 6.3.65, p 533 (S Edn 1965-66 p 35)).

5       EC Commission Regulation 2790/99 (OJ L336, 29.12.99, p 21).

6       EC Commission Regulation 1400/2002 (OJ L203, 1.8.2002, p 30). See also Case 10/86 *VAG France v Etablissements Magne SA* [1986] ECR 4071, [1988] 4 CMLR 98; and the decisions in Case T-23/90 *Automobiles Peugeot SA v EC Commission* [1991] ECR II-653, [1993] 5 CMLR 540, CFI; and Case T-9/92 *Automobiles Peugeot SA v EC Commission* [1993] ECR II-493, [1995] 5 CMLR 696, CFI (confirmed in Case C-322/93 *Automobiles Peugeot SA v EC Commission* [1994] ECR I-2727, ECJ).

- 7 See EC Council Regulation 2821/71 (OJ L285, 29.12.71, p 46).
- 8 See EC Commission Regulation 2658/2000 (OJ L304, 5.12.2000, p 3).
- 9 See EC Commission Regulation 2659/2000 (OJ L304, 5.12.2000, p 7).
- 10 See EC Commission Regulation 772/2004 (OJ L123, 27.04.2004, p 11). See also EC Commission Notice-Guidelines on the application of Article 81 of the EC Treaty to technology transfer agreements (OJ C101, 27.04.2004, p 2).
- 11 A block exemption for liner conferences (see EC Council Regulation 4056/86 (OJ L378, 31.12.86, p 4)) was abolished in 2006 (see EC Council Regulation 1419/2006 (OJ L269, 28.9.2006, p 1)).
- 12 See EC Commission Regulation 870/95 (OJ L89, 20.4.95, p 7) (made under EC Council Regulation 479/92 (OJ L55, 25.2.92, p 3)). See now EC Commission Regulation 823/00 (OJ L100, 20.4.2000, p 24).
- 13 *St Lawrence Coordinated Service* EC Commission Press Release IP (96)400 of 8 May 1996; *East Africa Container Service* (*Twenty-third Report on Competition Policy 1993*, point 230); *Joint Mediterranean Canada Service* 2 April 1996; *Joint Pool Agreement* 5 March 1997.
- 14 See EC Council Regulation 3976/87 (OJ L374, 31.12.87, p 9).
- 15 The applicable procedural regime for air transport is now that of the Modernisation Regulation (see note 1) together with EC Council Regulation 411/2004 (OJ L68, 6.3.2004, p 1).

## UPDATE

### 67 Group exemption

NOTE 14--Regulation 3976/87 replaced: EC Council Regulation 487/2009 (OJ L148, 11.6.2009, p 1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/ (4) ABUSE OF A DOMINANT POSITION/68. Prohibition of abuse of a dominant position.

## (4) ABUSE OF A DOMINANT POSITION

### 68. Prohibition of abuse of a dominant position.

The EC Treaty<sup>1</sup> prohibits any abuse by one or more undertakings of a dominant position<sup>2</sup> within the common market or in a substantial part of it<sup>3</sup> in so far as it may affect trade between member states<sup>4</sup>. The Treaty itself gives examples of what constitutes abuse<sup>5</sup>, though it does not provide an exhaustive list<sup>6</sup>.

Undertakings entrusted by a member state with the operation of services of general economic interest or having the character of a revenue-producing monopoly are subject to the rules of competition contained in the Treaty<sup>7</sup>, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them<sup>8</sup>.

For the EC Treaty article 82<sup>9</sup> to be applicable, an undertaking or undertakings must have abused their dominant position within the common market or a substantial part of it, and the abuse must be likely to have an effect on trade between member states. The concepts of 'undertakings' and 'an effect on trade between member states' have already been discussed in the context of article 81<sup>10</sup>. In relation to article 82, it is also necessary to consider the following

points: (1) what is meant by a dominant position<sup>11</sup>; (2) whether that position is held in a substantial part of the common market<sup>12</sup>; and (3) what behaviour is likely to be characterised as abusive<sup>13</sup>.

1 See the EC Treaty art 82, which is directly applicable in member states (see PARA 28). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 As to the meaning of 'dominant position' see PARA 69.

3 As to the meaning of 'substantial part of the common market' see PARA 70.

4 EC Treaty art 82.

5 See PARA 71.

6 See Case 6/72 *Europemballage Corp'n and Continental Can Co Inc v EC Commission* [1973] ECR 215, [1973] CMLR 199, ECJ.

7 This includes in particular the provisions of the EC Treaty art 82: art 86(2).

8 EC Treaty art 86(2). However, the development of trade must not be affected to such an extent as would be contrary to the interests of the Community: art 86(2). As to art 86(2) see PARA 27. Note that the Court of Justice has held that art 82 applies only to anti-competitive conduct engaged in by companies on their own initiative, not anti-competitive conduct required of the companies by national legislation: see Joined Cases C-359, 379/95P *EC Commission and France v Ladbroke Racing Ltd* [1997] ECR I-6265, [1998] 4 CMLR 27, ECJ.

9 See the text and notes 1-4.

10 See PARAS 55 et seq, 59.

11 See PARA 69.

12 See PARA 70.

13 See PARA 71.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/ (4) ABUSE OF A DOMINANT POSITION/69. Dominant position.

## **69. Dominant position.**

The EC Treaty article 82<sup>1</sup> does not define 'dominant position' or lay down any criteria that must be satisfied. It is necessary to look to the judgments of the courts and the decisions of the European Commission to determine the factors that can lead to a finding of dominance.

The European Court of Justice has described a dominant position as a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of its consumers. Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment<sup>2</sup>. There are two elements to the definition: the capacity to prevent effective competition; and having the power to behave independently<sup>3</sup>.



It has been established that article 82 covers both the buying and selling sides of the market<sup>4</sup>.

The market share of an undertaking is not the only factor which must be taken into account when assessing market power, although very large shares may be evidence of the existence of a dominant position<sup>5</sup>. There is a rebuttable presumption of dominance where an undertaking has a market share of 50 per cent or more<sup>6</sup>. It is possible to have a dominant position with a market share of less than 50 per cent<sup>7</sup>.

As well as market share, other factors in determining market power are barriers to expansion and entry<sup>8</sup> faced by competitors such as statutory monopolies<sup>9</sup> or other legal regulation<sup>10</sup>, intellectual property rights<sup>11</sup>, technological superiority<sup>12</sup>, economies of scale<sup>13</sup>, access to financial resources<sup>14</sup>, vertical integration and other vertical arrangements<sup>15</sup>, access to raw materials and other resources<sup>16</sup>, advertising and product differentiation<sup>17</sup>, the maturity of the market<sup>18</sup>, economic performance<sup>19</sup>, market conduct<sup>20</sup>, predatory pricing<sup>21</sup> and relationships with customers and competitors<sup>22</sup>. Countervailing buyer power (that is, the extent to which its customers are able to constrain an allegedly dominant undertaking) is also a factor to be considered<sup>23</sup>.

It is possible for two or more undertakings to be collectively dominant if they are linked in such a way that they adopt the same conduct on the market<sup>24</sup>, or present themselves or act together as a collective entity<sup>25</sup>; however, cases of abuse of collective dominance are rare.

A dominant position can exist only in relation to a relevant market and the delimitation of that market is of essential importance<sup>26</sup>. The relevant market consists of not only the product or services market<sup>27</sup>, but also the temporal and geographical market<sup>28</sup>.

1 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. See also PARA 68.

2 See Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211, ECJ. See also Case 27/76 *United Brands Co v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429, ECJ, which lays down a similar test.

3 The connection between the two elements is unclear. It has been suggested that the essential issue is the ability to act independently: see Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211, ECJ.

4 See eg Case C-95/04 *British Airways plc v EC Commission* [2007] ECR I-2331, [2007] 4 CMLR 982.

5 See Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211, ECJ. As to the calculation of market shares see EC Commission Notice on the Definition of the Relevant Market for the purposes of Community Competition Law (OJ C372, 9.12.97, p 5); and PARA 32.

6 This presumption was laid down in Case 62/86 *AKZO Chemie BV v EC Commission* [1991] ECR I-3359, [1993] 5 CMLR 215, ECJ. Where the presumption is established, the undertaking concerned has the burden of showing that it is not dominant.

7 See Case 27/76 *United Brands Co v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429, ECJ (undertaking with a market share of 40-45% was dominant); EC Commission Decision 2000/74 (*British Airways/Virgin*) OJ [2000] L30, 4.2.2000, p 1, [2000] 4 CMLR 999; and in further stages Case T-219/99 *British Airways v EC Commission* [2003] ECR II-5917, [2004] 4 CMLR 1008, CFI; Case C-95/04 P *British Airways plc v EC Commission* [2007] ECR I-2331, [2007] 4 CMLR 982, ECJ (39.7% share was dominant where the competitors' market shares were relatively low and there were other factors indicating dominance, and despite the fact that the share held by the particular undertaking was in decline).

8 In 2005 the Directorate-General for Competition issued a *Discussion Paper on the Application of article 82 of the Treaty to Exclusionary Abuses*, 19 December 2005; and in 2009 the Commission issued the *Communication from the Commission -- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C45, 24.2.2009, p 7). Those papers give an indication of the kinds of factor likely in future to be relevant in considering whether there are barriers to entry or expansion in any given case. The list in the text and notes below is drawn from decisions of the ECJ, the CFI or the EC Commission, and the papers mentioned above draw largely from the such decisions.

9 See eg Case 26/75 *General Motors Continental NV v EC Commission* [1975] ECR 1367, [1976] 1 CMLR 95; Case 226/84 *British Leyland plc v EC Commission* [1986] ECR 3263, [1987] 1 CMLR 185; Case 311/84 *Centre Belge d'Etudes de Marché-Télémarketing v CLT* [1985] ECR 3261, [1986] 2 CMLR 558.

10 See EC Commission Decision 89/113 (*Decca Navigator System*) OJ L43, 15.2.89, p 27, [1990] 4 CMLR 627.

11 Ownership of intellectual property rights does not necessarily put the owner into a dominant position (see Case 24/67 *Parke, Davis & Co v Probel* [1968] ECR 55, [1968] CMLR 47; Case 40/70 *Sirena v Eda* [1971] ECR 69, [1971] CMLR 260; Case 78/70 *Deutsche Grammophon v Metro* [1971] ECR 487, [1971] CMLR 631; Cases C-241-242/91P *RTE and ITP v EC Commission* [1995] ECR I-743, [1995] 4 CMLR 718) but may be a significant factor (see eg Case T-30/89 *Hilti AG v EC Commission* [1991] ECR II-1439, [1992] 4 CMLR 16; confirmed on appeal Case C-53/92P *Hilti AG v EC Commission* [1994] ECR I-667, [1994] 4 CMLR 614; EC Commission Decision 88/501 (*Tetra Pak*) OJ L272, 4.10.88, p 27, [1990] 4 CMLR 47).

12 The European Court of Justice has held that a position of technological superiority allows an undertaking an advantage in terms of product development: see eg Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211; Case 27/76 *United Brands v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429.

13 I.e. the relation of costs of production to the size of the market. See eg Case 27/76 *United Brands Co v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429, ECJ; EC Commission Decision 89/22 (*BPB Industries plc*) OJ L10, 13.1.89, p 50, [1989] 4 CMLR 84.

14 See Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211; Case 27/76 *United Brands v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429. See also EC Commission Decision 72/21 (*Continental Can Co*) OJ L7, 8.1.72, p 25, [1972] CMLR D11.

15 See Case 27/76 *United Brands v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429; EC Commission Decision 89/22 (*BPB Industries plc*) OJ L10, 13.1.89, p 50, [1989] 4 CMLR 84.

16 See eg EC Commission Decision 89/22 (*BPB Industries plc*) OJ L10, 13.1.89, p 50, [1989] 4 CMLR 84 (undertaking controlled virtually all the deposits of gypsum in Great Britain); EEC Commission Decision 91/299 (*Soda-ash/Solvay*) OJ L152, 15.6.91, p 21, (undertaking was the largest producer of the raw material (salt) in the Community).

17 See eg Case 27/76 *United Brands v EC Commission* [1978] ECR 207, [1978] 1 CMLR 429 (bananas were repeatedly advertised as superior to other brands). See also Case 322/81 *Nederlandsche Banden-Industrie Michelin v EC Commission* [1983] ECR 3461, [1985] 1 CMLR 282; EC Commission Decision 93/252 (*Wilkinson Sword/Gillette*) OJ L116, 12.5.93, p 21.

18 Where the market is mature new entrants may be discouraged from entering it: see eg EC Commission Decision 88/501 (*Tetra Pak*) OJ L272, 4.10.88, p 27, [1990] 4 CMLR 47.

19 See Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211.

20 I.e. looking at the undertaking's commercial behaviour as an indicator of dominance: see EEC Commission Decision 91/299 (*Soda-ash/Solvay*) OJ L152, 15.6.91, p 21; Case T-30/89 *Hilti AG v EC Commission* [1991] ECR II-1439, [1992] 4 CMLR 16 (confirmed on appeal Case C-53/92P *Hilti AG v EC Commission* [1994] ECR I-667, [1994] 4 CMLR 614).

21 I.e. reducing prices to drive competitors from the market. See eg EC Commission Decision 88/518 (*Napier Brown/British Sugars*) OJ L284, 19.10.89, p 41, [1990] 4 CMLR 196; Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211.

22 See eg EEC Commission Decision 91/299 (*Soda-ash/Solvay*) OJ L152, 15.6.91, p 21.

23 See the Directorate-General for Competition *Discussion Paper on the Application of article 82 of the Treaty to Exclusionary Abuses*, 19 December 2005; and the *Communication from the Commission -- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C45, 24.2.2009, p 7); and Case T-228/97 *Irish Sugar v EC Commission* [2000] All ER (EC) 198, [1999] ECR II-2969, CFI.

24 See Case C-393/92 *Gemeente Alemo v NV Energiebedrijf IJsselmij* [1994] ECR I-1477; elaborating on the principle stated in EEC Commission Decision 89/93 (*Italian Flat Glass*) OJ L33, 4.2.89, p 44, [1990] 4 CMLR 535. See further Case T-342/99 *Airtours plc v EC Commission* [2002] ECR II-2585, [2002] 5 CMLR 317.

25 Case T-193/02 *Laurent Piau v EC Commission* [2005] ECR II-209, [2005] 5 CMLR 42, CFI.

26 See Case 6/72 *Europemballage Corpn and Continental Can Co Inc v EC Commission* [1973] ECR 215, [1973] CMLR 199, ECJ.

27 The relevant product market has been discussed in eg Case 322/81 *Nederlandsche Banden-Industrie Michelin v EC Commission* [1983] ECR 3461, [1985] 1 CMLR 282; Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211, ECJ; Case 6/72 *Europemballage Corpn and Continental Can Co Inc v EC Commission* [1973] ECR 215, [1973] CMLR 199, ECJ.

28 See EC Commission Notice on the Definition of the Relevant Market for the purposes of Community Competition Law (OJ C372, 9.12.97, p 5). The concept of the relevant market has been discussed in relation to the EC Treaty art 81 (see PARA 32).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/ (4) ABUSE OF A DOMINANT POSITION/70. Substantial part of the common market.

## 70. Substantial part of the common market.

Article 82<sup>1</sup> does not apply unless the dominant position<sup>2</sup> is held in the whole or a substantial part of the common market<sup>3</sup>. It is a question of fact in each case which cannot be determined solely on a geographical basis. The pattern and volume of the production and consumption of the product as well as the habits and economic opportunities of vendors and purchasers must be considered<sup>4</sup>. A substantial part cannot be determined solely by looking at the percentage of the common market involved<sup>5</sup>. A member state has been held to be a substantial part of the common market<sup>6</sup>, as has a part of a member state<sup>7</sup>.

1 See the EC Treaty art 82; and PARA 68. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. This is a separate issue from determining the relevant market (see PARA 69 text and notes 26-28).

2 See PARA 69.

3 See the EC Treaty art 82; and PARA 69.

4 See Joined Cases 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v EC Commission* [1975] ECR 1663, [1976] 1 CMLR 295, ECJ.

5 Such an approach has been criticised: see Case 77/77 *Benzine en Petroleum Handelsmaatschappij BV v EC Commission* [1978] ECR 1513, [1978] 3 CMLR 174, ECJ.

6 See Joined Cases 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v EC Commission* [1975] ECR 1663, [1976] 1 CMLR 295, ECJ; Case 26/75 *General Motors Continental NV v EC Commission* [1975] ECR 1367, [1976] 1 CMLR 95, ECJ; Case 322/81 *Nederlandsche Banden-Industrie Michelin v EC Commission* [1983] ECR 3461, [1985] 1 CMLR 282.

7 See Joined Cases 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v EC Commission* [1975] ECR 1663, [1976] 1 CMLR 295, ECJ; Case 22/78 *Hugin Kassaregister AB v EC Commission* [1979] ECR 1869, [1979] 3 CMLR 345, ECJ. In some cases, a particular place has been held to be a substantial part of the common market: see eg *B & I Line plc v Sealink Harbours Ltd and Sealink Stena Ltd* [1992] 5 CMLR 255 (port of Holyhead); EC Commission Decision 98/190 (*KLM Royal Dutch Airlines NV v Flughafen Frankfurt/Main AG*) OJ L72, 11.3.98, p 30, [1998] 4 CMLR 779 (Frankfurt Airport).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/ (4) ABUSE OF A DOMINANT POSITION/71. Abusive behaviour.

## 71. Abusive behaviour.

It is not a contravention of EC competition law simply that an undertaking is dominant in the whole or part of the common market<sup>1</sup>. For an offence to be committed, the undertaking must have abused the position of dominance<sup>2</sup>.

A number of examples of abusive behaviour are given in article 82, namely:

- (1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions<sup>3</sup>;
- (2) limiting production, markets or technical development to the prejudice of consumers<sup>4</sup>;
- (3) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage<sup>5</sup>; and
- (4) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts<sup>6</sup>.

The term 'abuse' may also cover practices which affect the structure of the market and so affect competition<sup>7</sup>. The categories of abuse are not closed and may include conduct that would be unexceptionable in a non-dominant firm.

A distinction is drawn between exploitative abuses, that is to say the exploiting of customers by reducing output and increasing prices, and exclusionary abuses, that is to say behaviour aimed at reducing competition. The European Commission gives priority to exclusionary abuses which are liable to have harmful effects on consumers, the most common of which are exclusive dealing, rebates, tying and bundling, predatory practices, refusal to supply and margin squeeze<sup>8</sup>.

1 See the EC Treaty art 82; and PARAS 69-70. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 See the EC Treaty art 82; and PARA 69. A dominant undertaking owes a special responsibility to the competitive process: see Case 322/81 *Nederlandsche Banden-Industrie Michelin v EC Commission* [1983] ECR 3461, [1985] 1 CMLR 282. 'Superdominant' undertakings (ie undertakings whose dominance approaches monopoly) owe a greater responsibility: see Cases C-395-396/96P *Compagnie Maritime Belge Transports SA v EC Commission* [2000] All ER (EC) 385, [2000] ECR I-1365, ECJ.

3 EC Treaty art 82(a). See Case T-340/03 *France Télécom SA (formerly Wanadoo Interactive SA) v EC Commission* [2008] All ER (EC) 677, [2007] 4 CMLR 919, CFI (evidence of predatory pricing amounted to abuse of dominant position).

4 EC Treaty art 82(b).

5 EC Treaty art 82(c).

6 EC Treaty art 82(d).

7 See EC Commission Decision 72/21 (*Continental Can Co*) OJ L7, 8.1.72, p 25, [1972] CMLR D11; Case 322/81 *Nederlandsche Banden-Industrie Michelin v EC Commission* [1983] ECR 3461, [1985] 1 CMLR 282; Case 85/76 *Hoffmann-La Roche & Co AG v EC Commission* [1979] ECR 461, [1979] 3 CMLR 211.

8 See *Communication from the Commission -- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C45, 24.2.2009, p 7).

**UPDATE****71 Abusive behaviour**

NOTE 7--See also *Gas and Electricity Markets Authority v National Grid plc* [2010] EWCA Civ 114, [2010] All ER (D) 296 (Feb).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/ (4) ABUSE OF A DOMINANT POSITION/72. Defences.

**72. Defences.**

If a dominant undertaking<sup>1</sup> can show that its conduct can be objectively justified then the conduct will not be held to be an abuse<sup>2</sup>. This concept has been applied to distinguish legitimate commercial behaviour from abusive conduct aimed at weakening the competition<sup>3</sup>.

The European Commission has stated that in the enforcement of article 82<sup>4</sup>, it will examine claims put forward by a dominant undertaking that its conduct is justified. A dominant undertaking may do so either by demonstrating that its conduct is objectively necessary or by demonstrating that its conduct produces substantial efficiencies which outweigh any anticompetitive effects on consumers. In this context, the Commission will assess whether the conduct in question is indispensable and proportionate to the goal allegedly pursued by the dominant undertaking<sup>5</sup>.

1 See PARA 69.

2 As to abusive behaviour see PARA 71.

3 See eg Case 311/84 *Centre Belge d'Etudes de Marché-Télémarketing v CLT* [1985] ECR 3261, [1986] 2 CMLR 558. Tie-in provisions were found to have no objective justification in EC Commission Decision 88/138 (*Hilti*) OJ L65, 11.3.88, p 19, [1989] 4 CMLR 677; and EC Commission Decision 92/163 (*Tetra Pak II*) (upheld in Case T-83/91 *Tetra Pak International SA v EC Commission* [1994] ECR II-755, [1997] 4 CMLR 726, CFI).

4 See the EC Treaty art 82; and PARAS 69-70. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

5 See *Communication from the Commission -- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings* (OJ C45, 24.2.2009, p 7) paras 28-31.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(i) Control by the Merger Regulation/73. Concentration.

**(5) MERGER CONTROL****(i) Control by the Merger Regulation****73. Concentration.**

Until 1990 article 82 of the EC Treaty<sup>1</sup> operated to some degree to govern the control concentrations and mergers under EC competition law<sup>2</sup>. However, the point ceased to be of practical importance when a distinct regime for the control of mergers was introduced by the adoption of the Merger Control Regulation<sup>3</sup>.

In 2004 the Merger Control Regulation was itself replaced by the Merger Regulation<sup>4</sup>.

1 See the EC Treaty art 82; and PARA 68. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 See Case 6/72 *Europemballage Corp and Continental Can Co Inc v EC Commission* [1973] ECR 215, [1973] CMLR 199, ECJ, where the court held that some merger activity could be controlled under art 82.

3 Ie EC Council Regulation 4064/89 (OJ L395, 30.12.89, p 1) (the 'Merger Control Regulation').

4 Ie EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation'). See PARA 74.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(i) Control by the Merger Regulation/74. The Merger Regulation.

## **74. The Merger Regulation.**

A Council regulation on the control of concentration between undertakings (the 'Merger Regulation')<sup>1</sup> came into force on 1 May 2004.

The regulation contains extensive provisions to deal with concentration. A concentration is deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or the acquisition, by persons already controlling one undertaking, of direct or indirect control of other undertakings<sup>2</sup>. The regulation covers concentrations with a Community dimension where:

- (1) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million; and
- (2) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state<sup>3</sup>.

A concentration that does not meet these thresholds may nevertheless have a Community dimension where:

- (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million;
- (b) in each of at least three member states, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;
- (c) in each of at least three member states included for the purpose of head (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state<sup>4</sup>.

A concentration between foreign entities that has anti-competitive effects within the Community will fall within the scope of the regulation provided that the turnover thresholds set out above are satisfied<sup>5</sup>. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, is incompatible with the common market<sup>6</sup>.

Concentrations are appraised by the Commission with a view to establishing whether or not they are compatible with the common market, taking into account the need to maintain and develop effective competition within the common market, and the market position of the undertakings concerned and their economic and financial power<sup>7</sup>.

The regulation provides for:

- (i) mandatory prior notification of all concentrations that satisfy the regulation's turnover requirements<sup>8</sup>;
- (ii) a mandatory suspensory period during which the concentration may not be implemented until the Commission has adopted a final decision unless a specific individual derogation is granted<sup>9</sup>;
- (iii) fines of up to 10 per cent of the annual turnover of the companies concerned for a failure to notify, for implementation of the concentration in the suspensory period or following a determination that the concentration is incompatible with the common market<sup>10</sup>; and
- (iv) a review procedure by the Court of Justice<sup>11</sup>.

1       I.e. EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation'). See also EC Commission Regulation 802/2004 implementing EC Council Regulation 139/2004 and its annexes (OJ L33, 30.04.2004, p 1) (the 'Implementing Regulation'). The Merger Regulation replaced EC Council Regulation 4064/89 (OJ L395, 30.12.89, p 1) (the 'Merger Control Regulation'). As to the application of EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) generally see art 21.

2       EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 3(1). Control may be taken by purchase of securities or assets, by contract or by any other means: art 3(1). The creation of a joint venture constitutes a concentration: see art 3(4). As to when concentrations are not deemed to arise see art 3(5).

3       EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 1(2). As to the calculation of turnover see art 5. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

4       EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 1(3).

5       See Case T-102/96 *Gencor Ltd v EC Commission* [1997] ECR II-879, [1997] 5 CMLR 290, [1998] 1 CMLR 142, [1999] All ER (EC) 289, CFI.

6       EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 2(3).

7       See EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 2.

8       EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 4(1). Failure to comply with the notification requirements may result in the undertakings being fined: art 14. See eg EC Commission Decision 1999/459 (*A P Møller*) OJ L183, 16.7.99, p 29 in which an undertaking was fined EUR 219,000 for failing to notify and for putting into effect three concentrations. As to fines see PARA 107 et seq.

9       EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 7.

10 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 14.

11 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 16.

## UPDATE

### 74 The Merger Regulation

NOTE 2--See Case T-151/05 *Nederlandse Vakbond Varkenshouders (NVV) v EC Commission* [2009] 5 CMLR 1613, CFI.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(i) Control by the Merger Regulation/75. Supplementary notices.

### 75. Supplementary notices.

The Commission has issued a number of notices supplemental to or interpretative of the Merger Regulation<sup>1</sup> dealing with: jurisdiction<sup>2</sup>; simplified procedure<sup>3</sup>; case referrals<sup>4</sup>; non-horizontal guidelines<sup>5</sup>; horizontal guidelines<sup>6</sup>; relevant market<sup>7</sup>; remedies<sup>8</sup>; ancillary restraints<sup>9</sup>; the role of the hearing officer<sup>10</sup>; access to file<sup>11</sup>; and abandonment of concentrations<sup>12</sup>.

1 le EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1). See PARA 74.

2 See Commission Consolidated Jurisdictional Notice under EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ C95, 16.4.2008, p 1).

3 See Commission Notice on a simplified procedure for treatment of certain concentrations under EC Council Regulation 139/2004 (OJ C56, 5.3.2005, p 32).

4 See Commission Notice on Case Referral in respect of concentrations (OJ C56, 5.3.2005, p 2).

5 See Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C265, 18.10.2008, p 6).

6 See Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ C31, 5.2.2004, p 5).

7 See Commission notice on the definition of the Relevant Market for the purposes of Community competition law (OJ C372, 9.12.97, p 5).

8 See Commission Notice on remedies acceptable under EC Council Regulation 139/2004 and under EC Commission Regulation 802/2004 (OJ C267, 22.10.2008, p 1).

9 See Commission Notice on restrictions directly related and necessary to concentrations (OJ C56, 5.3.2005, p 24).

10 See Commission Decision 2001/462 of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ L162, 19.6.2001, p 21).

11 See Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and EC Council Regulation 139/2004 (OJ C325, 22.12.2005, p 7).

12 See DG Competition Information note on EC Council Regulation 139/2004 art 6(1)(c) 2nd sentence (abandonment of concentrations).



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/76. Notification of concentrations.

## **(ii) Procedural Aspects of Merger Control**

### **76. Notification of concentrations.**

Concentrations with a Community dimension<sup>1</sup> must be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest<sup>2</sup>. Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension<sup>3</sup>.

The Commission must publish the fact of the notification, at the same time indicating the names of the undertakings concerned, their country of origin, the nature of the concentration and the economic sectors involved<sup>4</sup>.

Prior to the notification of a concentration, the parties involved may inform the Commission, by means of a reasoned submission, that the concentration may significantly affect competition in a market within a member state which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that member state<sup>5</sup>. The relevant member state then has 15 working days to express disagreement, following which it is deemed to have agreed<sup>6</sup>. The Commission then has 25 working days to decide whether to refer the matter to the member state to be decided according to that state's national competition law<sup>7</sup>.

Where a case does not have a community dimension and is capable of being reviewed under the national competition laws of at least three member states, the parties involved may request that the concentration be examined by the Commission<sup>8</sup>. One or more member states may request the Commission to examine any concentration that does not have a community dimension but affects trade between member states and threatens to significantly affect competition within the territory of the member state or states making the request<sup>9</sup>.

1 See PARA 74.

2 EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 4(1). A concentration which consists of a merger or in the acquisition of joint control must be notified jointly by the parties to the merger or by those acquiring joint control as the case may be; and in all other cases, the notification must be effected by the person or undertaking acquiring control of the whole or parts of one or more undertakings: art 4(2). As to the fines payable for failure to notify and for incorrect notification see arts 14, 15, 16.

3 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 4(1).

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 4(3). The Commission must take account of the legitimate interest of undertakings in the protection of their business secrets: art 4(3).

5 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 4(4).

6 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 4(4).

7 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 4(4).

8 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 4(5). In such a case any of the member states concerned may express its disagreement within 15 working days. If no disagreement is expressed, the Commission has exclusive jurisdiction over the matter: see art 4(5).

9 See EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 22.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/77. Examination of the notification and initiation of proceedings.

## **77. Examination of the notification and initiation of proceedings.**

The Commission must examine the notification as soon as it is received<sup>1</sup>. Where it concludes that the concentration notified does not fall within the scope of the Merger Regulation, it must record that finding by means of a decision<sup>2</sup>. Where it finds that the concentration notified, although falling within the scope of the Regulation, does not raise serious doubts as to its compatibility with the common market, it must decide not to oppose it and must declare that it is compatible with the common market<sup>3</sup>. Where the Commission finds that the concentration notified falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the common market, it must decide to initiate proceedings<sup>4</sup>. Where the Commission finds that, following modification by the undertakings concerned, a notified concentration no longer raises serious doubts, it must declare the concentration compatible with the common market<sup>5</sup>. The Commission may revoke a decision where the decision is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or the undertakings concerned commit a breach of an obligation attached to the decision<sup>6</sup>.

The Commission must notify its decision to the undertakings concerned and the competent authorities of the member states without delay<sup>7</sup>.

1 EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 6(1). As to the notification see PARA 76. As to the Merger Regulation see further PARA 74.

2 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 6(1)(a).

3 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 6(1)(b). A decision declaring a concentration compatible is deemed to cover restrictions directly related and necessary to the implementation of the concentration: art 6(1). The Commission may attach to its decision under art 6(1)(b) conditions and obligations intended to ensure that the undertakings concerned comply with the commitments they have entered into vis-à-vis the Commission with a view to rendering the concentration compatible with the common market: art 6(2).

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 6(1)(c). Without prejudice to art 9 (see PARA 80), such proceedings are to be closed by means of a decision as provided for in art 8(1)-(4) (see PARA 79), unless the undertakings concerned have demonstrated to the satisfaction of the Commission that they have abandoned the concentration: art 6(1)(c).

5 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 6(2).

6 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 6(3), (4). As to time limits see art 10.

7 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 6(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/78. Suspension of concentrations.

## **78. Suspension of concentrations.**

A concentration with a Community dimension<sup>1</sup>, or which is to be examined by the Commission<sup>2</sup>, must not be implemented either before its notification<sup>3</sup> or until it has been declared compatible with the common market<sup>4</sup>. This prohibition does not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control is acquired from various sellers, provided that: (1) the concentration is notified to the Commission without delay; and (2) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission<sup>5</sup>.

The prohibition has no effect on the validity of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, unless the buyer and seller knew or ought to have known that the transaction was carried out in contravention of the prohibition<sup>6</sup>.

1 See PARA 74.

2 I.e. pursuant to EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 4(5) (see PARA 76). As to the Merger Regulation see further PARA 74.

3 See PARA 76.

4 EC Council Regulation 139/2004 (OJ L1, 4.1.2003, p 1) art 7(1). A declaration may be made pursuant to a decision under art 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to art 10(6). As to the fine payable for implementing a concentration in breach of art 7 see arts 14, 15, 16.

5 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 7(2). As to the Commission's power to grant a derogation see art 7(3).

6 EC Council Regulation 139/2004 (OJ L1, 4.1.2003, p 1) art 7.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/79. Powers of decision of the Commission.

## **79. Powers of decision of the Commission.**

Where the Commission finds that a notified concentration<sup>1</sup> would not significantly impede effective competition in the common market<sup>2</sup> or contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit<sup>3</sup>, it must issue a decision declaring the concentration compatible with the common market<sup>4</sup>. Where the Commission finds that a concentration does not fulfil these criteria, it must issue a decision declaring the concentration is incompatible with the common market<sup>5</sup>.

Where the Commission finds that a concentration has already been implemented and that concentration has been declared incompatible with the common market, or has been

implemented in contravention of a condition, the Commission may require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration, or order any other appropriate measure to ensure the concentration is dissolved<sup>6</sup>. The Commission may take interim measures to restore or maintain conditions of effective competition where necessary<sup>7</sup>.

The Commission may revoke a decision where the declaration of compatibility is based on incorrect information for which one of the undertakings is responsible or where it has been obtained by deceit, or the undertakings concerned commit a breach of an obligation attached to the decision<sup>8</sup>.

The Commission must notify its decision to the undertakings concerned and the competent authorities of the member states without delay<sup>9</sup>.

1 See PARA 76. This provision also applies where satisfactory modification has been made to a notified concentration: see EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 8(2). As to the Merger Regulation see further PARA 74.

2 It fulfils the criterion laid down in EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 2(2).

3 It fulfils the criteria laid down in the EC Treaty art 81(3). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 8(1). A decision declaring a concentration compatible is deemed to cover restrictions directly related and necessary to the implementation of the concentration: art 8(1). As to time limits see art 10. As to the application of time limits see art 8(7).

5 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 8(3).

6 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 8(4). In circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible: art 8(4).

7 See EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 8(5).

8 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 8(6).

9 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 8(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/80. Referral to the competent authorities of the member states.

## **80. Referral to the competent authorities of the member states.**

The Commission may, by means of a decision notified without delay to the undertakings concerned and the competent authorities of the other member states, refer a notified concentration<sup>1</sup> to the competent authorities of the member state concerned<sup>2</sup>. Within 15 working days of the date of receipt of the copy of the notification, a member state, on its own initiative or upon the invitation of the Commission, may inform the Commission, which must inform the undertakings concerned, that: (1) a concentration threatens to affect significantly competition in a market within that member state, which presents all the characteristics of a distinct market; or (2) a concentration affects competition in a market within that member state, which presents all the characteristics of a distinct market and which does not constitute a substantial

part of the common market<sup>3</sup>. If the Commission considers that there is such a distinct market and that such a threat exists, it must either deal with the case itself, or refer the whole or part of the case to the competent authorities of the member state concerned to be dealt with under that state's national competition law<sup>4</sup>. The competent authority must decide upon the case without undue delay and must inform the undertakings concerned within 45 days<sup>5</sup>. The member state concerned may take only the measures strictly necessary to safeguard or restore effective competition on the market concerned<sup>6</sup>.

1 See PARA 76.

2 EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 9(1). As to the Merger Regulation see further PARA 74.

3 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 9(2).

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 9(3). As to the relevant time limits see arts 9(4), (5), 10. As to the geographical area see art 9(7). As to appeals by the member state to the Court of Justice see art 9(9).

5 See EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 9(6).

6 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 9(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/81. Requests for information.

## **81. Requests for information.**

The Commission may, by simple request or by decision, require the persons carrying out a concentration<sup>1</sup> as well as undertakings and associations of undertakings, governments and competent authorities of member states, to provide all necessary information<sup>2</sup>. When requiring information, the Commission must state the legal basis and the purpose of the request, specify the information required and the time limits that apply and indicate the penalties for failure to comply<sup>3</sup>. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, must supply the information requested on behalf of the undertaking concerned<sup>4</sup>. The Commission must without delay forward a copy of any decision taken to the competent authorities of the member state in whose territory the residence of the person or the seat of the undertaking or association of undertakings is situated, and to the competent authority of the member state whose territory is affected<sup>5</sup>.

The Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation<sup>6</sup>. At the beginning of the interview, which may be conducted by telephone or other electronic means, the Commission must state the legal basis and the purpose of the interview<sup>7</sup>.

1 See PARAS 74, 76.

2 EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 11(1). As to the Merger Regulation see further PARA 74.

3 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 11(2), (3). Where the requirement to provide information is made by decision, the Commission must inform the person of the right to have the decision reviewed by the Court of Justice: art 11(3). As to the fines payable for the supply of misleading, incomplete or incorrect information see arts 14, 15, 16.

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 11(4). Persons duly authorised to act may supply the information on behalf of their clients but the clients remain fully responsible if the information supplied is incomplete, incorrect or misleading: art 11(4).

5 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 11(5). At the specific request of the competent authority of a member state, the Commission must also forward to that authority copies of simple requests for information relating to a notified concentration: art 11(5).

6 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 11(7). Where an interview is not conducted on the premises of the Commission or by telephone or other electronic means, the Commission must inform in advance the competent authority of the member state in whose territory the interview takes place; if the competent authority so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview: art 11(7).

7 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 11(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/82. Powers of inspection.

## **82. Powers of inspection.**

The Commission may conduct all necessary inspections of undertakings and associations of undertakings<sup>1</sup>. The officials and other accompanying persons authorised by the Commission to conduct an inspection have the power:

- (1) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (2) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (3) to take or obtain in any form copies of or extracts from such books or records;
- (4) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- (5) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers<sup>2</sup>.

At the request of the Commission, the competent authorities of the member states must undertake the inspections which the Commission considers to be necessary<sup>3</sup>.

Undertakings are required to submit to inspections ordered by decision of the Commission<sup>4</sup>. Where an undertaking opposes an inspection, the member state must provide any necessary assistance to the Commission officials, including police assistance<sup>5</sup>. If a warrant is required, the national judicial authority must ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection<sup>6</sup>.

1 EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 13(1). As to the Merger Regulation see further PARA 74.

2 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 13(2). Officials must produce a written authorisation for the inspection showing the penalties for failure to comply: see art 13(3). As to the fines payable see arts 14, 15, 16.

3 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 12(1). Such inspections must be carried out in accordance with the member state's national law: art 12(1). If so requested by the Commission or by the competent authority of the member state within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned: art 12(2). The officials of the authority concerned have the powers set out in heads (1)-(5) in the text: see art 12(5).

4 See EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 13(4).

5 See EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 13(6), (7).

6 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 13(8). The national judicial authority may ask the Commission for detailed explanations relating to the subject matter of the inspection but it may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file; the lawfulness of the Commission's decision is subject to review only by the Court of Justice: art 13(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/83. Professional secrecy.

### **83. Professional secrecy.**

Information acquired<sup>1</sup> by the Commission is to be used only for the purposes of the relevant request, investigation or hearing<sup>2</sup>. The Commission and the competent authorities of the member states, their officials and other servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the member states must not disclose information they have acquired<sup>3</sup> of the kind covered by the obligation of professional secrecy<sup>4</sup>. These prohibitions do not prevent publication of general information or of surveys which do not contain information relating to particular undertakings or associations of undertakings<sup>5</sup>.

1 I.e. as the result of the application of EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation'). As to the Merger Regulation see further PARA 74.

2 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 17(1).

3 See note 1.

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 17(2). Privilege may extend to documents which have not been sent to a lawyer but have been drafted for that purpose: Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd v EC Commission* [2008] All ER (EC) 1, [2008] 4 CMLR 97, CFI.

5 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 17(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/84. Hearing of the parties and of third persons.

#### **84. Hearing of the parties and of third persons.**

Before taking certain decisions<sup>1</sup>, the Commission is required to give the persons, undertakings and associations of undertakings concerned the opportunity, at every stage of the procedure up to the consultation of the Advisory Committee, of making known their views on the objections against them<sup>2</sup>. The Commission must base its decision only on objections on which the parties have been able to submit their observations<sup>3</sup>. The rights of the defence must be fully respected in the proceedings<sup>4</sup>. Access to the file must be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets<sup>5</sup>.

In so far as the Commission or the competent authorities of the member states deem it necessary, they may also hear other natural or legal persons<sup>6</sup>. Natural or legal persons showing a sufficient interest and especially members of the administrative or management bodies of the undertakings concerned or the recognised representatives of their employees are entitled, upon application, to be heard<sup>7</sup>.

1        le as provided for in EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 6(3), art 7(3), art 8(2)-(6) and arts 14 and 15 (see PARA 77 et seq). As to the Merger Regulation see further PARA 74.

2        EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 18(1). However, a decision pursuant to arts 7(3), 8(5) may be taken provisionally, without the persons, undertakings or associations of undertakings concerned being given the opportunity to make known their views beforehand, provided that the Commission gives them that opportunity as soon as possible after having taken its decision: art 18(2). As to the Advisory Committee see PARA 85.

3        EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 18(3).

4        EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 18(3).

5        EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 18(3).

6        EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 18(4).

7        EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 18(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/85. Liaison with the authorities of the member states.

#### **85. Liaison with the authorities of the member states.**

The Commission must transmit to the competent authorities of the member states copies of notifications<sup>1</sup> within three working days and, as soon as possible, copies of the most important documents lodged with or issued by the Commission<sup>2</sup>. Such documents must include commitments offered by the undertakings concerned to the Commission with a view to rendering the concentration compatible with the common market<sup>3</sup>. The Commission must carry out any procedures in close and constant liaison with the competent authorities of the member states, which may express their views upon those procedures<sup>4</sup>.

An Advisory Committee on concentrations must be consulted before certain decisions are taken<sup>5</sup>. The Advisory Committee consists of representatives of the competent authorities of the



member states. Each member state must appoint one or two representatives; if unable to attend, they may be replaced by other representatives. At least one of the representatives of a member state must be competent in matters of restrictive practices and dominant positions<sup>6</sup>. Consultation takes place at a joint meeting convened at the invitation of and chaired by the Commission. A summary of the case, together with an indication of the most important documents and a preliminary draft of the decision to be taken for each case considered, is sent with the invitation. The meeting takes place not less than ten working days after the invitation has been sent. The Commission may in exceptional cases shorten that period as appropriate in order to avoid serious harm to one or more of the undertakings concerned by a concentration<sup>7</sup>. The Advisory Committee delivers an opinion on the Commission's draft decision, if necessary by taking a vote. The Advisory Committee may deliver an opinion even if some members are absent and unrepresented. The opinion is delivered in writing and appended to the draft decision. The Commission must take the utmost account of the opinion delivered by the Committee and must inform the Committee of the manner in which its opinion has been taken into account<sup>8</sup>. The Commission must communicate the opinion of the Advisory Committee, together with the decision, to the addressees of the decision. It must make the opinion public together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets<sup>9</sup>.

1 See PARA 76.

2 EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') art 19(1). As to the Merger Regulation see further PARA 74.

3 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1). See PARAS 77, 79.

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 19(2).

5 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 19(3). This applies to any decision taken pursuant to arts 8(1)-(6), 14, 15, with the exception of provisional decisions taken in accordance with art 18(2) (see PARA 79 et seq).

6 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 19(4).

7 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 19(5).

8 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 19(6).

9 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 19(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(5) MERGER CONTROL/(ii) Procedural Aspects of Merger Control/86. Publication of decisions.

## **86. Publication of decisions.**

The Commission is required to publish the decisions which it takes<sup>1</sup>, together with the opinion of the Advisory Committee<sup>2</sup>, in the Official Journal of the European Union<sup>3</sup>. The publication must state the names of the parties and the main content of the decision; it must have regard to the legitimate interest of undertakings in the protection of their business secrets<sup>4</sup>.

1 I.e. pursuant to EC Council Regulation 139/2004 on the control of concentrations between undertakings (OJ L24, 29.1.2004, p 1) (the 'Merger Regulation') arts 8(1)-(6), 14, 15 with the exception of provisional

decisions taken in accordance with art 18(2) (see PARA 79 et seq). As to the Merger Regulation see further PARA 74.

2 See PARA 85.

3 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 20(1).

4 EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) art 20(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(i) National Authorities and the Commission/87. Legislative powers.

## **(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82**

### **(i) National Authorities and the Commission**

#### **87. Legislative powers.**

Within three years of the entry into force of the EC Treaty, the Council was to adopt appropriate regulations to give effect to the principles set out in articles 81 and 82<sup>1</sup>. Until the entry into force of such provisions, the authorities of the member states were to rule on the admissibility of agreements and decisions and on concerted practice and on abuse of the dominant position in accordance with the law of their country and the provisions of articles 81 and 82<sup>2</sup>. In fact, there were no decisions taken by member states during the transitional period and with the enactment of Regulation 17 of 1962<sup>3</sup>, it was no longer possible for member states to rely on these powers, other than in relation to sea and air transport and in these areas such a possibility was removed by regulations passed in 1986<sup>4</sup>, 1987<sup>5</sup>, 2004<sup>6</sup> and 2006<sup>7</sup>.

Without prejudice to the power of member states to rule on the admissibility of decisions, agreements and practices<sup>8</sup>, the Commission must ensure the application of the principles laid down in articles 81 and 82. On application by a member state or on its own initiative, and in co-operation with the competent authorities in the member states (who must give it their assistance), the Commission must investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it must propose appropriate measures to bring it to an end<sup>9</sup>.

In 2003, a new procedure was put into place by the Modernisation Regulation<sup>10</sup>. This replaced the previous system with a directly applicable system in which the competition authorities and courts of the member states have the power to apply articles 81 and 82 of the EC Treaty in full<sup>11</sup>.

1 EC Treaty art 83. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Treaty art 84.

3 ie EC Council Regulation 17 of 6 February 1962 (OJ 1962 p 204; (S Edn 1959-1962 p 87)) art 4, para 2(1).

4 EC Council Regulation 4056/86 (OJ L378, 31.12.86, p 4).

5 EC Council Regulation 3976/87 (OJ L374, 31.12.87, p 9).

6 EC Council Regulation 411/2004 (OJ L68, 6.3.2004, p 1).

- 7 EC Council Regulation 1419/2006 (OJ L269 28.9.2006 p 1).
- 8 ie under the EC Treaty art 84 (see the text and note 2).
- 9 EC Treaty art 85(1). If the infringement is not brought to an end, the Commission must record such infringement of the principles in a reasoned decision; it may publish its decision and authorise member states to take the measures, the conditions and details of which it must determine, needed to remedy the situation: art 85(2).
- 10 ie EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1).
- 11 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) arts 5, 6.

## UPDATE

### 87 Legislative powers

NOTE 5--Regulation 3976/87 replaced: EC Council Regulation 487/2009 (OJ L148, 11.6.2009, p 1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(i) National Authorities and the Commission/88. Jurisdiction and liaison.

### 88. Jurisdiction and liaison.

The Commission must transmit copies of the most important documents lodged therewith to the competent authorities of the member states<sup>1</sup>. The competition authorities and the national courts of the member states have the power to apply articles 81 and 82 of the Treaty in individual cases<sup>2</sup>. The competition authorities of the member states must inform the Commission in writing before or without delay after commencing the first formal investigative measure<sup>3</sup>. The Commission and the competition authorities of the member states have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information<sup>4</sup>. Where competition authorities of two or more member states have received a complaint or are acting on their own initiative against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case is sufficient grounds for the others to suspend the proceedings before them or to reject the complaint, and the Commission may likewise reject a complaint on the ground that a competition authority of a member state is dealing with the case<sup>5</sup>. Where a competition authority of a member state or the Commission has received a complaint against an agreement, decision of an association or practice which has already been dealt with by another competition authority, it may reject it<sup>6</sup>.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 11(2). As to the right of an individual lawyer to see copies of replies which the European Commission had given to member state courts who asked for information about the application and interpretation of various aspects of EC Competition rules see Joined Cases C-174/98P and C-189/98P *Netherlands v EC Commission* [2000] ECR I, [2002] 1 CMLR 457, sub nom *Van der Wal (supported by Kingdom of The Netherlands, intervener) v EC Commission* (2000) Times, 22 February, ECJ.

2 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) arts 5, 6. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

- 3 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 11(3).
- 4 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 12.
- 5 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 13(1).
- 6 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 13(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(i) National Authorities and the Commission/89. The Advisory Committee on Restrictive Practices and Dominant Positions.

### **89. The Advisory Committee on Restrictive Practices and Dominant Positions.**

Before it makes a decision as to the infringement of the EC Treaty article 81 or article 82<sup>1</sup>, the Commission is required to consult the Advisory Committee on Restrictive Practices and Dominant Positions, which is composed of representatives of the competition authorities of the member states<sup>2</sup>. The Commission must take the utmost account of the opinion delivered by the Advisory Committee<sup>3</sup>.

1 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 14(1), (2).

3 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 14(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(i) National Authorities and the Commission/90. Sector inquiries.

### **90. Sector inquiries.**

The Commission may conduct inquiries into any economic sector and in that regard may request undertakings in the sector concerned to supply the information necessary for the Commission's investigation<sup>1</sup>. The Commission may in particular request the undertaking concerned to communicate to it all agreements, decisions and concerted practices<sup>2</sup>. The Commission may publish a report on the results of its inquiry into particular sectors of the economy or particular types of agreements across various sectors and invite comments from interested parties<sup>3</sup>. Recent sector inquiries have been carried out in relation to business insurance<sup>4</sup>, retail banking<sup>5</sup> and gas and electricity<sup>6</sup> amongst others.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 17(1).

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 17(1). As to concerted practices see PARA 63.

3 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 17(1).

4 See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Sector Inquiry under Article 17 of Regulation (EC) No 1/2003 on business insurance* (COM/2007/0556).

5 See *Communication from the Commission - Sector Inquiry under Article 17 of EC Regulation 1/2003 on retail banking* (COM/2007/0033).

6 See *Communication from the Commission - Inquiry pursuant to Article 17 of EC Regulation 1/2003 into the European gas and electricity sectors* (COM/2006/0851).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/91. Requests for information.

## **(ii) Administrative Procedure**

### **91. Requests for information.**

The Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information<sup>1</sup>. When requiring information, the Commission must state the legal basis and the purpose of the request, specify the information required and the time limits that apply and indicate the penalties for failure to comply<sup>2</sup>. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or associations having no legal personality, the persons authorised to represent them by law or by their constitution, must supply the information requested on behalf of the undertaking concerned<sup>3</sup>. The Commission must without delay forward a copy of any decision taken to the competent authorities of the member state in whose territory the seat of the undertaking or association of undertakings is situated, and to the competent authority of the member state whose territory is affected<sup>4</sup>.

The Commission may interview any natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation<sup>5</sup>.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 18(1). As to the Modernisation Regulation see further PARA 29.

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 18(2), (3). Where the requirement to provide information is made by decision, the Commission must inform the person of the right to have the decision reviewed by the Court of Justice: art 18(3). As to the fines payable for the supply of misleading, incomplete or incorrect information see arts 23, 24.

3 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 18(4). Lawyers duly authorised to act may supply the information on behalf of their clients but the clients remain fully responsible if the information supplied is incomplete, incorrect or misleading: art 18(4).

4 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 18(5).

5 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 19(1). Where an interview is conducted on the premises of an undertaking the Commission must inform the competent authority of the member state in whose territory the interview takes place; if the competent authority so requests, officials of that authority may assist the officials and other persons authorised by the Commission to conduct the interview: art 19(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/92. Powers of inspection.

## **92. Powers of inspection.**

The Commission may conduct all necessary inspections of undertakings and associations of undertakings<sup>1</sup>. The officials and other accompanying persons authorised by the Commission to conduct an inspection have the power:

- (1) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (2) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (3) to take or obtain in any form copies of or extracts from such books or records;
- (4) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- (5) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers<sup>2</sup>.

At the request of the Commission, the competent authorities of the member states must undertake the inspections which the Commission considers to be necessary<sup>3</sup>.

Undertakings are required to submit to inspections ordered by decision of the Commission<sup>4</sup>. Where an undertaking opposes an inspection, the member state must provide any necessary assistance to the Commission officials, including police assistance<sup>5</sup>. If a warrant is required, the national judicial authority must ensure that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection<sup>6</sup>.

Provision is made for the inspection of other premises, land or means of transport (including the homes of directors and staff of the undertaking concerned) with due prior authorisation<sup>7</sup>.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 20(1). As to the Modernisation Regulation see further PARA 29.

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 20(2). Officials must produce a written authorisation for the inspection showing the penalties for failure to comply: see art 20(3). As to the fines payable see arts 23-26.

3 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 22(2). Such inspections must be carried out in accordance with the member state's national law: art 22(2). If so requested by the Commission or by the competent authority of the member state within whose territory the inspection is to be conducted, officials and other accompanying persons authorised by the Commission may assist the officials of the authority concerned: art 20(5). The officials of the authority concerned have the powers set out in heads (1)-(5) in the text: see art 20(5).

4 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 20(4).

5 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 20(6), (7).

6 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 20(8). The national judicial authority may ask the Commission for detailed explanations relating to the subject matter of the inspection but it may not call into question the necessity for the inspection nor demand that it be provided with the information in the

Commission's file; the lawfulness of the Commission's decision is subject to review only by the Court of Justice: see art 20(8).

7 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 21.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/93. Professional secrecy.

### **93. Professional secrecy.**

Information collected in relation to competition proceedings<sup>1</sup> may be used only for the purpose for which it was acquired<sup>2</sup>. Without prejudice to the permitted exchange and use of information between the Commission and the competition authorities of the member states, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the member states must not disclose information acquired or exchanged by them<sup>3</sup> and of the kind covered by the obligation of professional secrecy<sup>4</sup>. This obligation also applies to all representatives and experts of member states attending meetings of the Advisory Committee<sup>5</sup>.

1 le information collected pursuant to EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) arts 17-22.

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 28(1).

3 See note 1.

4 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 28(2). Privilege may extend to documents which have not been sent to a lawyer but have been drafted for that purpose: Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd v EC Commission* [2008] All ER (EC) 1, [2008] 4 CMLR 97, CFI.

5 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 28(2). The Advisory Committee meets pursuant to art 14 (see PARA 89).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/94. Statement of objection and hearing of the parties, complainants and others.

### **94. Statement of objection and hearing of the parties, complainants and others.**

Before taking decisions relating to infringements, interim measures or fines<sup>1</sup>, the Commission must give the undertakings or associations of undertakings which are the subject of the proceedings conducted by the Commission the opportunity of being heard on the matters to which the Commission has taken objection. The Commission must base its decisions only on objections on which the parties concerned have been able to comment. Complainants must be associated closely with the proceedings<sup>2</sup>.

The Commission must inform the parties concerned of the objections raised against them in a statement of objections which must be notified in writing to each of the parties against whom objections are raised<sup>3</sup>. It is essential that the Commission serves a statement of objection on

the parties in sufficient detail to enable them to ascertain the nature of the complaint against them and the matters on which the Commission has based its initial views<sup>4</sup>. It is not necessary that all the information necessary for the undertaking to be made aware of the case against it is disclosed in the initial statement of objection, as long as the details necessary for the undertaking's defence are supplied in the course of the administrative procedure and the undertaking concerned has an opportunity to rebut any fact produced which is contrary to its interests. The mere fact that a statement of objection has been made does not prevent the Commission from continuing its investigations; equally, the statement does not require to be particularly detailed, provided it indicates the essential facts on which the Commission bases its case. Whilst the Commission is required to provide reasons for its decision (if it ultimately reaches a formal decision), it does not require to refute all the arguments adduced during administrative procedures<sup>5</sup>. The statement of objection must not be ambiguous, but must set out clearly the intention and effect of the action for breach of the rules of competition<sup>6</sup>.

Neither the initiation of a procedure, nor a statement of objection, may be considered by its nature and the legal effects which it produces as being a 'decision' which is capable of being challenged in an action for a declaration that it is void<sup>7</sup>. In the context of an administrative procedure, they are procedural measures adopted preparatory to the decision that represents their culmination.

The rights of defence of the parties concerned must be fully respected in the proceedings. They are entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets. The right of access to the file does not extend to confidential information and internal documents of the Commission or the competition authorities of the member states. In particular, the right of access does not extend to correspondence between the Commission and the competition authorities of the member states, or between the latter. However, nothing in these provisions prevents the Commission from disclosing and using information necessary to prove an infringement<sup>8</sup>.

If the Commission considers it necessary, it may also hear other natural or legal persons. Applications to be heard on the part of such persons, where they show a sufficient interest, must be granted. The competition authorities of the member states may also ask the Commission to hear other natural or legal persons<sup>9</sup>.

Where the Commission intends to adopt a decision relating to commitments or making a finding of inapplicability<sup>10</sup>, it must publish a concise summary of the case and the main content of the commitments or of the proposed course of action. Interested third parties may submit their observations within a time limit which is fixed by the Commission in its publication and which may not be less than one month. Regard must be had to the legitimate interest of undertakings in the protection of their business secrets<sup>11</sup>.

1       le as provided for in EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) arts 7, 8, 23 and 24(2).

2       EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 27(1).

3       See EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 10.

4       See Case T-221/95 *Endemol Entertainment Holding BV v EC Commission* [1999] All ER (EC) 385, [1999] 5 CMLR 611, CFI (right of businesses to have their business secrets protected had to be balanced against safeguarding rights of defence; Commission could be required to reconcile opposing interests by preparing non-confidential versions of documents containing business secrets or other sensitive information).

5       Case 41/69 *ACF Chemiefarma NV v EC Commission* [1970] ECR 661, ECJ (Quinine Cartel).

6       Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, 104/95 *Cimenteries CBR SA v EC Commission* [2000] ECR II-491, [2000] 5 CMLR 204, CFI.



7 Case 60/81 *International Business Machines Corp v EC Commission* [1981] ECR 2639, [1981] 3 CMLR 635, ECJ. See also Case C-413/06 *Bertelsmann AG v Independent Music Publishers and Labels Association* [2008] 5 CMLR 1073, [2008] All ER (D) 151 (Jul) (ECJ: Grand Chamber).

8 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 27(2).

9 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 27(3).

10 le pursuant to EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 9 or art 10.

11 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 27(4).

## UPDATE

### 94 Statement of objection and hearing of the parties, complainants and others

NOTE 7--*Bertelsmann*, cited, reported at [2010] All ER (EC) 377.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/95. Service.

### 95. Service.

The Commission is required to inform undertakings in writing of the objections raised against them and only to deal in its decisions with those objections raised against undertakings in respect of which they have been afforded the opportunity of making known their views<sup>1</sup>. There is no particular method by which the complaint is to be brought to the attention of the undertaking concerned, and posting the statement to an undertaking outside the Community can still constitute effective service<sup>2</sup>. It has been held that the fact that the notification did not comply with the law of the state where the undertaking was established did not affect the service of the document as far as Community law was concerned, because the undertaking had received it and had thus an opportunity of making known its views<sup>3</sup>.

1 See EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 10. See also Case T-221/95 *Endemol Entertainment Holding BV v EC Commission* [1999] All ER (EC) 385, [1999] 5 CMLR 611, CFI.

2 Case 52/69 *JR Geigy AG v EC Commission* [1972] ECR 787, [1972] CMLR 557, ECJ.

3 Case 52/69 *JR Geigy AG v EC Commission* [1972] ECR 787, [1972] CMLR 557, ECJ. See also Case 53/69 *Sandoz AG v EC Commission* [1972] ECR 845, [1972] CMLR 557, ECJ.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/96. Hearings.

### 96. Hearings.

The Commission has set out the procedures to be followed in a hearing to afford an undertaking an opportunity to reply to a statement of objections<sup>1</sup>. This procedure distinguishes between parties to whom the Commission has addressed objections<sup>2</sup> and other interested parties<sup>3</sup>, provides for the recording of statements made at oral hearings, and for tape recording to replace written minutes<sup>4</sup>. The procedures set out in the regulation apply in all competition cases other than mergers<sup>5</sup>.

1 See EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) arts 11-14.

As to access to the Commission's administrative file see PARA 101. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 See EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) arts 11, 12.

3 See EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 13.

4 See EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 13(8).

5 See PARA 74.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/97. The Hearing Officer.

## 97. The Hearing Officer.

Following its *Eleventh Report on Competition Policy*<sup>1</sup>, the Commission appointed a Hearing Officer to ensure hearings are properly conducted and to contribute to the objectivity of the hearing itself and of any decision taken subsequently. The Hearing Officer is to seek to ensure in particular that in the preparation of draft Commission decisions in competition cases due account is taken of all relevant facts, whether favourable or unfavourable to the parties concerned, and to see that the rights of the defence are respected, taking account of the need for effective application of the competition rules in accordance with the regulations in force under principles laid down by the Court of Justice<sup>2</sup>.

It has been stated that the report of the Hearing Officer does not require to be passed either to the Advisory Committee<sup>3</sup> or to the Commission; the report is not one which the Commission was required to obtain when taking a decision pursuant to article 81 of the EC Treaty<sup>4</sup>.

In 1994 the Commission extended the terms of reference of the Hearing Officer by delegating to him the right to take decisions concerning the right to a hearing and on access to the Commission's file on the matter<sup>5</sup>.

In May 2001, the Commission further strengthened the role of the Hearing Officer by attaching him directly to the Competition Commissioner; his report will be made available to the parties and will be published in the *Official Journal* with the final decision, improving transparency in the decision making process<sup>6</sup>.

Oral hearings are to be conducted by a Hearing Officer in full independence<sup>7</sup>.

1 See *Eleventh Report on Competition Policy 1981*, point 26.

2 EC Commission Notice on Procedures for applying the Competition Rules (OJ C251, 25.9.82, p 2); Terms of Reference in *Thirteenth Report on Competition Policy 1983*, pp 273, 274. It should be noted that there had only been one case in which a decision had been annulled because the Commission introduced into a formal

decision a matter which was not raised at the hearing stage: see Case 17/74 *Transocean Marine Paint Association v EC Commission* [1974] ECR 1063, [1974] 2 CMLR 459, ECJ.

3 As to the Advisory Committee see PARA 372.

4 Joined Cases T-1-4, 6-8/89 *Rhône-Poulenc SA v EC Commission* [1990] ECR II-637, [1991] ECR II-867, CFI. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

5 EC Commission Decision 94/810 (OJ L330, 21.12.94, p 67). It is also believed that the Commission has approved a notice (to be published) dealing with parties' access to the Commission's file: See EC Commission Press Release IP (94)957 of 19 October 1994. As to the file see PARA 388.

6 EC Commission Press Release IP (01)736 of 23 May 2001.

7 See EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 14.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/98. Notification of decisions.

## 98. Notification of decisions.

Decisions must be notified to the persons to whom they are addressed, and take effect upon such notification<sup>1</sup>. Irregularities in the procedure of notification of the decision are external to the legal act and therefore cannot vitiate it<sup>2</sup>.

A decision is properly notified within the meaning of the EC Treaty if it reaches the addressee and puts the latter in a position to take cognisance of it<sup>3</sup>. It does not appear essential that notification is made in any particular way, or indeed that notification is made directly to the undertaking in question, although this would be the normal procedure<sup>4</sup>.

1 EC Treaty art 254. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 Case 48/69 *Imperial Chemical Industries Ltd v EC Commission* [1972] ECR 619, [1972] CMLR 557, ECJ. In that case, a decision taken against ICI in the United Kingdom (which at that time was not a member of the Community) was notified by sending a copy of the decision to its German subsidiary which, ICI maintained, did not have authority to accept service on its behalf. In addition, under German law, such a subsidiary was under no obligation to bring the documents in question to ICI's notice. However, in that case, it was apparent that ICI had complete knowledge of the text of the decision and availed itself of the opportunity within the time limits provided in the decision to raise an action for its annulment: Case 48/69 *Imperial Chemical Industries Ltd v EC Commission* at 652, 620, ECJ (judgment, para 42).

3 Case 6/72 *Europemballage Corp'n and Continental Can Co Inc v EC Commission* [1973] ECR 215 at 241, [1973] CMLR 199 at 221, ECJ (judgment, para 10).

4 Cf the procedure for service of a statement of objections (see PARA 95).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/99. Publicity.

## 99. Publicity.

The Commission is required to publish the decisions which it takes in respect of infringement of article 81 or article 82 of the EC Treaty<sup>1</sup> and in respect of penalties for breach<sup>2</sup>. The publication must state the names of the parties and the main content of the decision, including any penalties imposed<sup>3</sup>. Regard must be had to the legitimate interest of undertakings in the protection of their business secrets<sup>4</sup>.

The fact that the Commission had issued a press release at the time a statement of objection was issued, and before the undertakings concerned had an opportunity to defend their position, did not vitiate the legality of the decision which was ultimately taken<sup>5</sup>.

1 See PARAS 61-68. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 30(1).

3 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 30(2).

4 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 30(2).

5 Joined Cases 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v EC Commission* [1975] ECR 1663, [1976] 1 CMLR 295, ECJ. The Court of Justice suggested in its judgment that the action by the Commission in making such a press release was not free from criticism: Joined Cases 40-48, 50, 54-56, 111, 113, 114/73 *Coöperatieve vereniging Suiker Unie UA v EC Commission* at 1927, 413, ECJ (judgment paras 89-93).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/100. Reasoning.

## 100. Reasoning.

The Commission is required to state the reasons on which its decision is based<sup>1</sup>, enumerating the facts forming the legal basis of the measure and the considerations which led it to adopt that decision<sup>2</sup>. Nevertheless, the Commission is not required to discuss all the issues of fact and of law which may have been touched on by every interested person in the course of the administrative procedure.

With regard more particularly to decisions imposing a fine, it appears that the statement of reasons is to be considered sufficient if it indicates clearly and coherently the considerations of fact and of law on the basis of which the fine has been imposed on the parties concerned in such a way as to acquaint both the latter and the Court of Justice with the essential factors of the Commission's reasoning<sup>3</sup>.

1 EC Treaty art 253. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 As to the extent of the duty to give reasons see Case 73/74 *Groupement des Fabricants de Papiers Peints de Belgique v EC Commission* [1975] ECR 1491 at 1514, [1976] 1 CMLR 589 at 614, ECJ.

3 Thus in Case 41/69 *ACF Chemiefarma NV v EC Commission* [1970] ECR 661 at 683, 684, ECJ (Quinine Cartel) (judgment, paras 22-30), it was held that the Commission did not infringe an essential procedural requirement by omitting from the reasons for its decision factors which it, rightly or wrongly, considered irrelevant to the proceedings. However, in Case T-61/89 *Dansk Pelsdyravlereforening v EC Commission* [1992]

ECR II-1931, CFI, a decision of the Commission dealing with concerted practices was in part annulled on the ground that the reasoning of the decision was not sufficiently precise.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/101. The administrative file.

### **101. The administrative file.**

If so requested, the Commission must grant access to the file to the parties to whom it has addressed a statement of objections<sup>1</sup>. The right of access to the file does not extend to business secrets, other confidential information and internal documents of the Commission or of the competition authorities of the member states<sup>2</sup>. Nor does it extend to correspondence between the Commission and the competition authorities of the member states or between the latter where such correspondence is contained in the file of the Commission<sup>3</sup>. However, this does not prevent the Commission from disclosing and using information necessary to prove an infringement of article 81 or 82 of the EC Treaty<sup>4</sup>. Documents obtained through access to the file pursuant to these provisions may only be used for the purposes of judicial or administrative proceedings for the application of articles 81 and 82 of the EC Treaty<sup>5</sup>.

The Court of First Instance has rejected a decision by the Commission to deny access to documents that contained information or trade secrets of the applicants or third parties unless the persons concerned continued to assert the claim that the information was confidential. Each document was then to be considered to determine whether its age, nature and relevance to the matter in hand justified continuing confidentiality. In addition, for the Commission's internal documents, there is no general rule of administrative confidentiality; access to each document has to be balanced against the requirements of judicial supervision and the rights of the defence<sup>6</sup>.

In 2005 the Commission published a notice laying down new internal rules for access to the file, and concerned with the extent of the right of access; and practical procedures for the exercise of the right<sup>7</sup>.

1 EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 15(1). Access is to be granted after the notification of the statement of objections: art 15(1). As to the statement of objections see PARA 94. See Case T-7/89 *Hercules Chemicals NV SA v EC Commission* [1991] ECR II-1711, [1992] 4 CMLR 84, CFI. As to the procedure for allowing the addressees of a statement of objections to examine evidence in the Commission's files, so that they are able properly to defend themselves against the objections raised, see Case T-221/95 *Endemol Entertainment Holding BV v European Commission* [1999] All ER (EC) 385, [1999] 5 CMLR 611, CFI; and Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103, 104/95 *Cimenteries CBR SA v EC Commission* [2000] ECR II-491, [2000] 5 CMLR 204, CFI.

2 EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 15(2).

3 EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 15(2).

4 EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 15(3). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

5 EC Commission Regulation 773/2004 (OJ L123, 27.4.2004, p 18) art 15(4).

6 Joined Cases T-134, 136-138, 141, 145, 147, 148, 151, 156, 157/94 *NMH Stahlwerke GmbH v EC Commission* [1996] ECR II-537, [1997] 5 CMLR 227, CFI (interim ruling) (the 'Steel Beams' case). See also Case T-30/91 *Solvay SA v EC Commission* [1995] ECR II-1775, [1996] 5 CMLR 57, CFI.

7 EC Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ C325, 22.12.05, p 7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(ii) Administrative Procedure/102. Limitation of actions.

## **102. Limitation of actions.**

Provision is made that the power of the Commission to impose fines or periodic penalties<sup>1</sup> is subject to limitation periods of three years in the case of infringements of provisions concerning requests for information or the conduct of inspections, and of five years in the case of all other infringements<sup>2</sup>. Time begins to run on the day on which the infringement is committed, and in the case of continuing or repeated infringements, time begins to run on the day on which the infringement ceases<sup>3</sup>.

The limitation period is interrupted by any action of the Commission or by the competition authority of a member state for the purpose of the investigation or proceedings in respect of an infringement. Each interruption starts time running afresh, but the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty<sup>4</sup>.

Proceedings before the Court of Justice suspend the limitation period<sup>5</sup>. The power of the Commission to enforce decisions imposing fines, penalties or periodic payments is subject to a five-year limitation period<sup>6</sup>.

1 le under EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') arts 23, 24. See PARA 107.

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 25(1).

3 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 25(2). See also Case 243/83 *Binon et Cie SA v SA Agence et messageries de la presse* [1985] ECR 2015, [1985] 3 CMLR 800, ECJ.

4 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 25(3), (5).

5 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 25(3), (6).

6 See EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 26.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(iii) Interim Measures by the Commission/103. Power to take interim measures.

## **(iii) Interim Measures by the Commission**

### **103. Power to take interim measures.**

In cases of urgency due to the risk of serious and irreparable damage to competition, the Commission, acting on its own initiative may by decision, on the basis of a prima facie finding of infringement, order interim measures<sup>1</sup>. Such a decision applies for a specified period of time and may be renewed in so far as this is necessary and appropriate<sup>2</sup>.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 8(1).

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 8(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(iv) Final Decisions of the Commission/104. Termination of infringement.

#### **(iv) Final Decisions of the Commission**

##### **104. Termination of infringement.**

Where the Commission finds that there is an infringement of article 81 or 82 of the EC Treaty, it may by decision require the undertakings concerned to bring such infringement to an end<sup>1</sup>. For this purpose, it may impose on them any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past<sup>2</sup>. The Commission may also take interim decisions<sup>3</sup>.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 7(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 7(1).

3 See PARA 103.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(iv) Final Decisions of the Commission/105. Guidance letters.

##### **105. Guidance letters.**

Where cases give rise to genuine uncertainty because they present novel or unresolved questions for the application of articles 81 and 82 of the EC Treaty<sup>1</sup>, individual undertakings may wish to seek informal guidance from the Commission. Where it considers it appropriate and subject to its enforcement priorities, the Commission may provide such guidance on novel questions concerning the interpretation of article 81 or 82 in a written guidance letter<sup>2</sup>.

1 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 See Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases (guidance letters) (OJ C101, 27.4.2004, p 78). Guidance letters are not Commission decisions and do not bind member states' competition authorities or courts although it is open to them to take account of guidance letters issued by the Commission as they see fit in the context of a case: see PARA 25.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(iv) Final Decisions of the Commission/106. Commitments.

### **106. Commitments.**

Where the Commission intends to adopt a decision requiring that an infringement be brought to an end and the undertakings concerned offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment, the Commission may by decision make those commitments binding on the undertakings<sup>1</sup>. Such a decision may be adopted for a specified period and must conclude that there are no longer grounds for action by the Commission<sup>2</sup>.

The Commission may, upon request or on its own initiative, reopen the proceedings where there has been a material change in any of the facts on which the decision was based; where the undertakings concerned act contrary to their commitments; or where the decision was based on incomplete, incorrect or misleading information provided by the parties<sup>3</sup>.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 9(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 9(1).

3 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 9(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(v) Sanctions and Penalties/107. Fines and periodic penalty payments in general.

### **(v) Sanctions and Penalties**

#### **107. Fines and periodic penalty payments in general.**

The Commission may by decision impose a fine not exceeding 1 per cent of total turnover in the previous business year on undertakings for supplying incorrect or misleading information intentionally or negligently<sup>1</sup>. The Commission may also by decision impose fines of up to 10 per



cent of the turnover in the previous business year on undertakings where, either intentionally or negligently they infringe article 81 or article 82 of the EC Treaty<sup>2</sup>, or they contravene a decision ordering interim measures<sup>3</sup>, or they fail to comply with a commitment made binding by a decision<sup>4</sup>.

In fixing the amount of the fine, regard is to be had both to the gravity and to the duration of the infringement<sup>5</sup>.

Decisions to impose such fines are not of the nature of criminal law<sup>6</sup>.

In addition to the fines under the provisions described above, the Commission is further empowered to impose periodic penalty payments not exceeding 5 per cent of the average daily turnover in the preceding business year per day, calculated from a date appointed by the decision, in order to compel undertakings:

- (1) to put an end to any infringement of article 81 or 82 in accordance with a decision taken by the Commission<sup>7</sup>;
- (2) to comply with a decision ordering interim measures<sup>8</sup>;
- (3) to comply with a commitment made binding by a decision<sup>9</sup>;
- (4) to supply complete and correct information which has been requested by a decision<sup>10</sup>;
- (5) to submit to an investigation which is ordered by a decision<sup>11</sup>.

Where the undertakings or associations of undertakings have satisfied the obligation which the periodic penalty payment was intended to enforce, the Commission may fix the definitive amount of the periodic penalty payment at a figure lower than that which would arise under the original decision<sup>12</sup>.

1 See EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 23(1).

2 As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

3 Ie under EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 8 (see PARA 103).

4 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 23(2). A commitment is made binding under art 9 (see PARA 106). See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2).

5 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 23(3). As to when an undertaking is insolvent see art 23(4).

6 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 23(5).

7 Ie under EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 7 (see PARA 104).

8 Ie under EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 8 (see PARA 103).

9 Ie under EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 9 (see PARA 106).

10 Ie under EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 17 or art 18(3) (see PARAS 90-91).

11 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 24(1). An investigation is ordered under art 20 (see PARA 92).

12 EC Council Regulation 1/2003 (OJ L1, 4.1.2003, p 1) art 24(2). Article 23(4) applies correspondingly: art 24(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(v) Sanctions and Penalties/108. Immunity from fines or reduction of fines in cartel cases.

### **108. Immunity from fines or reduction of fines in cartel cases.**

By the terms of a notice published by the Commission in 2006<sup>1</sup>, the following conditions must be fulfilled before immunity from or reduction of fines may be granted:

- (1) the undertaking disclosing its participation in an alleged cartel affecting the Community must be the first to submit information and evidence which in the Commission's view will enable it to carry out a targeted inspection in connection with the alleged cartel or find an infringement of article 81 of the EC Treaty<sup>2</sup> in connection with the alleged cartel<sup>3</sup>;
- (2) for the Commission to be able to carry out such a targeted inspection, the undertaking must provide the Commission with detailed information and evidence, to the extent that this, in the Commission's view, would not jeopardize the inspections<sup>4</sup>;
- (3) the undertaking must cooperate genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure<sup>5</sup>;
- (4) the undertaking must end its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections<sup>6</sup>;
- (5) when contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities<sup>7</sup>.

An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines but it may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefor<sup>8</sup>.

Undertakings disclosing their participation in an alleged cartel affecting the Community that do not meet the above conditions may be eligible to benefit from a reduction of any fine that would otherwise have been imposed<sup>9</sup>. In order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession and must meet the conditions set out in heads (3) to (5) above<sup>10</sup>.

The European Commission has introduced a settlement procedure for cartels to allow the Commission to settle cartel cases through a simplified procedure. Under this procedure, parties, having seen the evidence in the Commission file, choose to acknowledge their involvement in the cartel and their liability for it. In return for this acknowledgement, the Commission can reduce the fine imposed on the parties by 10 per cent<sup>11</sup>.

<sup>1</sup> ie EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17).

<sup>2</sup> As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

- 3 EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) para 8.
- 4 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) para 9.
- 5 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) para 12(a).
- 6 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) para 12(b).
- 7 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) para 12(c).
- 8 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) para 13.
- 9 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) para 23.
- 10 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) paras 24-26.
- 11 See EC Commission Regulation 622/2008 (OJ L171, 1.7.2008, p 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(v) Sanctions and Penalties/109. Guidelines on setting fines.

### **109. Guidelines on setting fines.**

The Commission has published guidelines on the method of setting fines in competition law cases<sup>1</sup>. Guidance is given as to method of determining the basic amount of the fine<sup>2</sup>, aggravating circumstances<sup>3</sup> and mitigating circumstances<sup>4</sup> which are to be taken into account, and the application of the Notice on Immunity from fines and reduction of fines in cartel cases<sup>5</sup>.

The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates<sup>6</sup>. The Commission will also take into account the need to increase the fine in order to exceed the amount of gains improperly made as a result of the infringement where it is possible to estimate that amount<sup>7</sup>.

The final amount of the fine must not, in any event, exceed 10 per cent of the total turnover in the preceding business year of the undertaking or association of undertakings participating in the infringement<sup>8</sup>.

The Commission will apply the leniency rules in line with the conditions set out in the applicable notice<sup>9</sup>.

In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in the Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value<sup>10</sup>.

The Commission may, in certain cases, impose a symbolic fine and the justification for imposing such a fine should be given in its decision<sup>11</sup>.

The guidelines present the general methodology for the setting of fines but the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified<sup>12</sup>.

1 See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2).

2 As to the basic amount see PARA 110.

3 As to aggravating circumstances see PARA 111.

4 As to mitigating circumstances see PARA 112.

5 See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17); and PARA 108.

6 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 30.

7 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 31.

8 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 32.

9 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 34. See EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17); and PARA 108.

10 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 35.

11 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 36.

12 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 37.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(v) Sanctions and Penalties/110. The basic amount.

## **110. The basic amount.**

The Commission's guidelines on the method of setting fines<sup>1</sup> provide that the basic amount is to be set by reference to the value of sales applying the following methodology:

(1) in calculating the value of sales:

1. (a) in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA and will normally take the sales made by the

undertaking during the last full business year of its participation in the infringement (hereafter 'value of sales'):

2. (b) where the infringement by an association of undertakings relates to the activities of its members, the value of sales will generally correspond to the sum of the value of sales by its members;
  3. (c) in determining the value of sales by an undertaking, the Commission will take that undertaking's best available figures;
  4. (d) where the figures made available by an undertaking are incomplete or not reliable, the Commission may determine the value of its sales on the basis of the partial figures it has obtained and/or any other information which it regards as relevant and appropriate;
  5. (e) the value of sales will be determined before VAT and other taxes directly related to the sales;
  6. (f) where the geographic scope of an infringement extends beyond the EEA (for example worldwide cartels), the relevant sales of the undertakings within the EEA may not properly reflect the weight of each undertaking in the infringement, in particular with worldwide market-sharing arrangements; in such circumstances, in order to reflect both the aggregate size of the relevant sales within the EEA and the relative weight of each undertaking in the infringement, the Commission may assess the total value of the sales of goods or services to which the infringement relates in the relevant geographic area (wider than the EEA), may determine the share of the sales of each undertaking party to the infringement on that market and may apply this share to the aggregate sales within the EEA of the undertakings concerned. The result will be taken as the value of sales for the purpose of setting the basic amount of the fine;
- (2) in determining the basic amount of the fine:
7. (a) the basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement;
  8. (b) the assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case;
  9. (c) as a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30 per cent of the value of sales;
  10. (d) in order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented;
  11. (e) horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition and, as a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale;
  12. (f) in order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year;

13. (g) in addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15 per cent and 25 per cent of the value of sales in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in head (2)(d);
14. (h) where the value of sales by undertakings participating in the infringement is similar but not identical, the Commission may set for each of them an identical basic amount and moreover, in determining the basic amount of the fine, the Commission will use rounded figures<sup>3</sup>.

<sup>1</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2).

<sup>2</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) paras 12-18.

<sup>3</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) paras 19-26.

## UPDATE

### 110 The basic amount

NOTE 3--There is no general principle that the fine must be proportionate to the importance of the undertaking on the product market: Case T-448/05 *Oxley Threads Ltd v European Commission* [2010] All ER (D) 01 (May), EGC. See Case T-116/04 *Wieland-Werke AG v EC Commission* [2009] 5 CMLR 1517, CFI (undertaking with largest market share had greater share of responsibility for infringement; uplift applied to larger undertakings for deterrence and to take account of their better understanding of unlawfulness of their conduct).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(v) Sanctions and Penalties/111. Aggravating circumstances.

### 111. Aggravating circumstances.

The Commission's guidelines on the method of setting fines<sup>1</sup> provide that the basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

- (1) where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed article 81 or 82 of the EC Treaty<sup>2</sup> and the basic amount will be increased by up to 100 per cent for each such infringement established;

(2) refusal to cooperate with or obstruction of the Commission in carrying out its investigations;

(3) role of leader in, or instigator of, the infringement; the Commission will also pay particular attention to any steps taken to coerce other undertakings to participate in the infringement and/or any retaliatory measures taken against other undertakings with a view to enforcing the practices constituting the infringement<sup>3</sup>.

<sup>1</sup> See Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2).

<sup>2</sup> As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

<sup>3</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 28.

## UPDATE

### 111 Aggravating circumstances

NOTE 3--See Case T-116/04 *Wieland-Werke AG v EC Commission* [2009] 5 CMLR 1517, CFI (increased fine imposed on undertaking with largest market share); and Case T-122/04 *Outokumpu v EC Commission* [2009] 5 CMLR 1553, CFI (50 per cent increase on fine justified for repetitive breach).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(v) Sanctions and Penalties/112. Mitigating circumstances.

### 112. Mitigating circumstances.

The Commission's guidelines on the method of setting fines<sup>1</sup> provide that the basic amount<sup>2</sup> may be reduced where the Commission finds that mitigating circumstances exist, such as:

(1) where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels<sup>3</sup>);

(2) where the undertaking provides evidence that the infringement has been committed as a result of negligence;

(3) where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market: the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

(4) where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice<sup>4</sup> and beyond its legal obligation to do so;

(5) where the anti-competitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation<sup>5</sup>.

1        le Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2).

2        See PARA 110.

3        See PARAS 108-109.

4        le EC Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C298, 8.12.2006, p 17) (see PARA 108).

5        Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ C210, 1.9.2006, p 2) para 29.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/(v) Sanctions and Penalties/113. More than one penalty on the same facts.

### **113. More than one penalty on the same facts.**

Although the Community and the member states have an obligation to take into account previous penalties imposed for the same set of facts<sup>1</sup>, this principle cannot apply in cases of a clash between penalties imposed under Community law and the laws of non-member states. Although the facts giving rise to the fines might be the same, the fact that the penalties were imposed for infringements of two separate sets of rules means that there can be no question of set-off between the two penalties imposed<sup>2</sup>.

1        As to the rule, now known as 'ne bis in idem', see Case 14/68 *Wilhelm v Bundeskartellamt* [1969] ECR 1, [1969] CMLR 100, ECJ.

2        See Case T-59/02 *Archer Daniels Midland Co v EC Commission* [2006] ECR II-3627, [2006] 5 CMLR 1528, CFI; upheld on appeal, [2009] All ER (D) 225, ECJ.

## **UPDATE**

### **113 More than one penalty on the same facts**

NOTE 2--Case C-510/06P *Archer Daniels*, cited, reported at [2009] 4 CMLR 889.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/2. COMMUNITY ASPECTS OF COMPETITION LAW/(6) PROCEDURAL ASPECTS TO THE ENFORCEMENT OF ARTICLES 81 AND 82/ (vi) Judicial Review/114. Powers of the Court of Justice.

## **(vi) Judicial Review**

### **114. Powers of the Court of Justice.**



The Court of Justice has unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed<sup>1</sup>. Article 230 of the Treaty, which is the basis for judicial review by the Court of Justice of acts of the Council and Commission, provides the basis for actions for annulment of all Commission decisions in the field of competition law. Article 232 provides for the right to make an application in respect of a failure to act by the Commission. Proceedings brought before the Court of Justice do not have suspensory effect, although the court may, if it considers the circumstances so require, order that application of the contested act be suspended<sup>2</sup>. The Court of Justice may, in any cases before it, prescribe any necessary interim measures<sup>3</sup>.

The Commission has issued a statement<sup>4</sup> reminding parties that even if an appeal were to be made against a Commission decision, this does not have suspensory effect and the parties are required to refrain from the conduct condemned until the appeal is successful or the decision is suspended<sup>5</sup>.

Only the operative parts of a decision are capable of being contested<sup>6</sup>.

The Court of Justice has held that the only parties who can benefit from a court ruling annulling a Commission decision are parties actually joined in the case before the court. A party who was subject to the original decision but had not challenged it before the Court of First Instance or Court of Justice cannot benefit from any order annulling the decision; as nothing has been decided in relation to those undertakings the original decision remains binding on them<sup>7</sup>. Under article 230 of the EC Treaty any Commission decision not challenged within the time limit specified becomes definitive against the addressee. It would be contrary to the principle of legal certainty if decisions against one party could be challenged outside that time limit by the mere fact that an addressee of an identical decision had sought to challenge that latter decision<sup>8</sup>.

1 EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.2003, p 1) (the 'Modernisation Regulation') art 31. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

2 EC Treaty art 242. See eg Case T-41/96R *Bayer AG v EC Commission* [1996] ECR II-381, [1996] 5 CMLR 290, CFI, in which the President of the court suspended the enforcement of a fine of ECU 3 million on Bayer on the basis that there was a prima facie case for appeal and also that Bayer would suffer serious and irreparable harm. In the 'PVC' cases, the Court of First Instance dismissed actions brought by PVC producers on the basis that, due to procedural irregularities, the Commission measure being challenged was non-existent: Joined Cases T-79, 84-86, 89, 91, 92, 96, 98, 102, 104/89 *BASF AG v EC Commission* [1992] ECR II-315, [1992] 4 CMLR 357, CFI.

3 EC Treaty art 243.

4 This statement was issued following EC Commission Decision 92/204 (*Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid*) OJ L92, 7.4.92, p 1.

5 EC Commission Press Release IP (92)195 of 17 March 1992.

6 *Elopak/Metal Box-Odin* EC Commission Notice (OJ C215, 30.8.87, p 3).

7 Case C-310/97P *EC Commission v AssiDomän Kraft Products AB* [1999] All ER (EC) 737, [1999] ECR I-5363, ECJ.

8 Case C-310/97P *EC Commission v AssiDomän Kraft Products AB* [1999] All ER (EC) 737, [1999] ECR I-5363, ECJ (judgment, para 63).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(1) INTRODUCTION/115. The Chapter I and Chapter II prohibitions.

### **3. THE**

#### **(1) INTRODUCTION**

##### **115. The Chapter I and Chapter II prohibitions.**

The Competition Act 1998, which entered fully into force on 1 March 2000, makes provision for the strengthening of United Kingdom competition law by the introduction of two principal prohibitions, the Chapter I prohibition<sup>1</sup> and the Chapter II prohibition<sup>2</sup>. The prohibitions are closely modelled on provisions of European Community law<sup>3</sup>, and provision is made for the prohibitions to be interpreted consistently with European competition law<sup>4</sup>. The Restrictive Trade Practices Act 1976, the Resale Prices Act 1976 and the Restrictive Trade Practices Act 1977, which formerly applied to agreements restrictive of competition, have been repealed and are replaced by the Chapter I prohibition<sup>5</sup>. The provisions in the Competition Act 1980 for the control of anti-competitive practices<sup>6</sup> have been repealed and replaced by the Chapter II prohibition<sup>7</sup>. The Competition Act 1998 has been substantially amended to implement the provisions of the EC Competition Regulation<sup>8</sup>.

The Office of Fair Trading has published numerous Guidelines on the operation of the Act<sup>9</sup>.

1 See the Competition Act 1998 s 2. As to the Chapter I prohibition see PARAS 116-124.

2 See the Competition Act 1998 s 18. As to the Chapter II prohibition see PARAS 125-128.

3 Ie the EC Treaty arts 81, 82 (see PARAS 61 et seq, 68 et seq). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

4 See the Competition Act 1998 s 60; and PARA 150.

5 See the Competition Act 1998 s 1.

6 Ie the Competition Act 1980 ss 2-10 (repealed).

7 Competition Act 1998 s 17.

8 Ie EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation'). The amendments to the Competition Act 1998 are made by the Competition Act 1998 and Other Enactments (Amendment) Regulations 2004, SI 2004/1261.

9 Provision is made for the preparation and publication of 'advice and information' by the Competition Act 1998 s 52: see PARA 145. Relevant Guidelines are referred to in the following paragraphs. As to the Office of Fair Trading see PARAS 6-8.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/116. Prohibited agreements.

#### **(2) THE CHAPTER I PROHIBITION**

##### **116. Prohibited agreements.**

Agreements between undertakings, decisions by associations of undertakings or concerted practices which: (1) may affect trade within the United Kingdom<sup>1</sup>; and (2) have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of Part I of the Competition Act 1998<sup>2</sup>. The above provision applies, in particular, to agreements, decisions or practices which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions<sup>3</sup>; (b) limit or control production, markets, technical development or investment<sup>4</sup>; (c) share markets or sources of supply<sup>5</sup>; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage<sup>6</sup>; or (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts<sup>7</sup>. This prohibition is referred to as the 'Chapter I prohibition'<sup>8</sup>. The Chapter I prohibition does not apply to certain excluded agreements<sup>9</sup>. The Chapter I prohibition applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom<sup>10</sup>. Any agreement or decision which is prohibited by the Chapter I prohibition is void<sup>11</sup>. A provision of Part I of the Competition Act 1998 which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice (but with any necessary modifications)<sup>12</sup>.

Guidance on the operation of the Chapter I prohibition can be found in the Guidelines of the Office of Fair Trading<sup>13</sup>. The following examples that might appreciably restrict competition are given in the Guidelines: agreements which have the object or effect of directly or indirectly fixing prices, fixing trading conditions, sharing markets, limiting or controlling production or investment, collusive tendering (bid-rigging), joint purchasing or selling, sharing information, exchanging price information, exchanging non-price information, restricting advertising or setting technical or design standards<sup>14</sup>.

1 In the Competition Act 1998 s 2, 'United Kingdom' means, in relation to an agreement which operates or is intended to operate only in a part of the United Kingdom, that part: s 2(7). As to the meaning of 'United Kingdom' generally see PARA 401 note 1.

2 Competition Act 1998 s 2(1). Part I of the Competition Act 1998 comprises ss 1-60. See eg *Institute of Independent Insurance Brokers v Director General of Fair Trading* [2001] All ER (D) 58 (Sep), Competition Commission Appeal Tribunal.

For decisions of the EC Commission and the European Court of Justice on the corresponding provisions of European Community law see PARAS 24 et seq, 61 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150. For a decision in which the relevant provisions both of the EC Treaty and the Competition Act 1998 were considered see *Hendry v World Professional Billiards and Snooker Association* [2001] All ER (D) 71 (Oct). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

3 Competition Act 1998 s 2(2)(a).

4 Competition Act 1998 s 2(2)(b).

5 Competition Act 1998 s 2(2)(c).

6 Competition Act 1998 s 2(2)(d).

7 Competition Act 1998 s 2(2)(e).

8 Competition Act 1998 ss 2(8), 59(1).

9 See PARA 117.

10 Competition Act 1998 s 2(3).

11 Competition Act 1998 s 2(4).

12 Competition Act 1998 s 2(5), which, however, does not apply where the context otherwise requires: s 2(6).

13 See OFT Guideline 401 *Agreements and concerted practices* (December 2004). See also, in particular, OFT Guideline 403 *Market Definition* (December 2004); OFT Guideline 408 *Trade Associations, Professional Bodies and Self-Regulating Bodies* (December 2004); OFT Guideline 419 *Vertical Agreements* (December 2004); OFT Guideline 420 *Land Agreements* (December 2004).

14 See OFT Guideline 401 *Agreements and concerted practices* (December 2004) para 3.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/117. Excluded agreements: introductory.

### **117. Excluded agreements: introductory.**

The Chapter I prohibition<sup>1</sup> does not apply in any of the cases in which it is excluded by or as a result of certain specified provisions<sup>2</sup>; these provisions relate to mergers and concentrations<sup>3</sup>, competition scrutiny under other enactments<sup>4</sup>; and planning obligations and other general exclusions<sup>5</sup>.

Provision is made for amendment to be made by the Secretary of State to these exclusions<sup>6</sup>.

The fact that to a limited extent the Chapter I prohibition does not apply to an agreement, because of an exclusion provided by or under Part I of the Competition Act 1998<sup>7</sup> or any other enactment, does not require those provisions of the agreement to which the exclusion relates to be disregarded when considering whether the agreement infringes the prohibition for other reasons<sup>8</sup>.

Provision is also made, and has been exercised, for the exclusion of vertical and land agreements from the Chapter I prohibition<sup>9</sup>.

1 As to the meaning of 'Chapter I prohibition' see PARA 116.

2 See the Competition Act 1998 s 3(1).

3 See the Competition Act 1998 s 3(1)(a), Sch 1; and PARA 118.

4 See the Competition Act 1998 s 3(1)(b), Sch 2; and PARA 119.

5 See the Competition Act 1998 s 3(1)(c), Sch 3; and PARA 120.

6 See PARAS 118, 120. As to the Secretary of State see PARA 5.

7 In the Competition Act 1998 Pt 1 (ss 1-60).

8 Competition Act 1998 s 59(2).

9 See PARA 142.

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/118. Excluded agreements: mergers and concentrations.

### **118. Excluded agreements: mergers and concentrations.**

To the extent to which an agreement (either on its own or when taken together with another agreement) results, or if carried out would result, in any two enterprises ceasing to be distinct enterprises<sup>1</sup>, the Chapter I prohibition<sup>2</sup> does not apply to the agreement<sup>3</sup>.

This exclusion does not apply to a particular agreement if the Office of Fair Trading (the 'OFT')<sup>4</sup> gives a direction to that effect<sup>5</sup>. If the OFT is considering whether to give such a direction, it may by notice in writing require any party to the agreement in question to give the OFT such information in connection with the agreement as it may require<sup>6</sup>; if at the end of such period as may be specified<sup>7</sup> a person<sup>8</sup> has failed, without reasonable excuse, to comply with such a requirement, the OFT may give a direction as described above<sup>9</sup>. The OFT may also give such a direction if: (1) it considers that the agreement will, if not excluded, infringe the Chapter I prohibition; and (2) the agreement is not a protected agreement<sup>10</sup>. The OFT may only give a direction in either of the circumstances described above<sup>11</sup>.

To the extent to which an agreement (either on its own or when taken together with another agreement) gives rise to, or would if carried out give rise to, a concentration<sup>12</sup>, the Chapter I prohibition does not apply to the agreement if the EC Merger Regulation<sup>13</sup> gives the European Commission<sup>14</sup> exclusive jurisdiction in the matter<sup>15</sup>.

1      Ie for the purposes of the Enterprise Act 2002 Pt 3 (ss 22-130): see in particular PARA 176.

2      As to the Chapter I prohibition see PARA 116.

3      Competition Act 1998 s 3(1)(a), Sch 1 para 1(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (50)(a)(ii)). This exclusion extends to any provision directly related and necessary to the implementation of the merger provisions: Competition Act 1998 Sch 1 para 1(2). 'Merger provisions' means the provisions of the agreement which cause, or if carried out would cause, the agreement to have the result of two enterprises ceasing to be distinct enterprises: Sch 1 para 1(3). The Enterprise Act 2002 s 26 (see PARA 176) applies with modifications for the purpose of this provision: Competition Act 1998 Sch 1 para 1(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (50)(a)(ii)).

The Secretary of State may at any time by order amend the Competition Act 1998 Sch 1, with respect to the Chapter I prohibition, by: (1) providing for one or more additional exclusions; or (2) amending or removing any provision (whether or not it has been added by an order under this provision): s 3(2). Such an order may include provision (similar to that made with respect to any other exclusion provided by Sch 1) for the exclusion concerned to cease to apply to a particular agreement: s 3(5).

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq, and particularly PARA 73 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

4      As to the OFT see PARAS 6-8.

5      Competition Act 1998 Sch 1 para 4(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (50)(c)(ii)). Such a direction must be in writing, and may be made so as to have effect from a date specified in the direction (which may not be earlier than the date on which it is given): Competition Act 1998 Sch 1 para 4(7).

6      Competition Act 1998 Sch 1 para 4(2) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (50)(c)(ii)). As to the meaning of 'information' see PARA 9 note 3.

7      Ie specified in rules under the Competition Act 1998 s 51 (see PARA 144).

8      'Person' includes any undertaking, in addition to the meaning given by the Interpretation Act 1978 (see **STATUTES** vol 44(1) (Reissue) PARA 1382): Competition Act 1998 s 59(1).

9 Competition Act 1998 Sch 1 para 4(4) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (50)(c)(i)).

10 Competition Act 1998 Sch 1 para 4(5) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (50)(c)(i); and by SI 2004/1261).

An agreement is a protected agreement for this purpose if: (1) the OFT or the Secretary of State has published its or his decision not to make a merger reference to the Competition Commission under the Enterprise Act 2002 s 22 (see PARA 172), s 33 (see PARA 182), s 45 (see PARA 193) or s 62 (see PARA 208) in connection with the agreement; (2) the OFT or the Secretary of State has made a merger reference to the Competition Commission under s 22, 33, 45 or 62 in connection with the agreement and the Commission has found that the agreement has given rise to, or would if carried out give rise to, a relevant merger situation (see PARA 173) or a special merger situation (see PARA 204); (3) the agreement does not fall within head (1) or head (2) but has given rise to, or would if carried out give rise to, enterprises to which it relates being regarded under s 26 (see PARA 176) as ceasing to be distinct enterprises (otherwise than as the result of s 26(3) or (4)(b)); or (4) the OFT has made a merger reference to the Competition Commission under the Water Industry Act 1991 s 32 (see **WATER AND WATERWAYS** vol 100 (2009) PARAS 150-151) in connection with the agreement and the Commission has found that the agreement has given rise to, or would if carried out give rise to, a merger of the kind to which that provision applies: Competition Act 1998 Sch 1 para 5 (amended by the Enterprise Act 2002 Sch 25 para 38(1), (50)(d)). As to the Secretary of State see PARA 5.

11 Competition Act 1998 Sch 1 para 4(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (50)(c)(i)).

12 'Concentration' means a concentration with a Community dimension within the meaning of the Merger Regulation arts 1, 3 (as to which see note 13): Competition Act 1998 Sch 1 para 6(3). As to concentrations see PARA 73 et seq.

13 le EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') (see PARA 74).

14 See PARA 123 note 2.

15 Competition Act 1998 Sch 1 para 6(1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/119. Excluded agreements: competition scrutiny under other enactments.

## 119. Excluded agreements: competition scrutiny under other enactments.

The Chapter I prohibition<sup>1</sup> does not apply in any of the cases in which it is excluded by or as a result of certain enactments which provide for competition scrutiny under enactments other than the Competition Act 1998<sup>2</sup>.

The exclusions referred to above relate to:

- (1) self-regulating organisations, investment exchanges and clearing houses, and professional bodies and investment business, under the Financial Services Act 1986<sup>3</sup>;
- (2) agreements relating to Channel 3 news provision, under the Broadcasting Act 1990<sup>4</sup>;
- (3) networking arrangements<sup>5</sup>;
- (4) provisions of the Financial Services and Markets Act 2000<sup>6</sup>.

1 As to the Chapter I prohibition see PARA 116.

2 See the Competition Act 1998 s 3(1)(b); the enactments are mainly those listed in Sch 2 (see the text and notes 3-6), but other enactments may themselves provide for exclusion from the Chapter I prohibition: see eg the text and note 6.

3 The Competition Act 1998 Sch 2 para 1(2), (4) substituted the Financial Services Act 1986 ss 125, 127 (repealed); see now the Financial Services and Markets Act 2000 s 164 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 42) and s 311 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 736).

4 See the Broadcasting Act 1990 s 194A(2)-(11) (substituted by the Competition Act 1998 Sch 2 para 4(2)); and **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 380.

5 le networking arrangements under the Communications Act 2003 s 291 (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 279); Competition Act 1998 Sch 2 para 5 (amended by the Communications Act 2003 ss 291(3), (4), 371(6)).

6 See the Financial Services and Markets Act 2000 s 164 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 42) and s 311 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 736).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/120. Excluded agreements: general exclusions.

## 120. Excluded agreements: general exclusions.

The Chapter I prohibition<sup>1</sup> does not apply in any of the cases in which it is excluded by or as a result of provisions of the Competition Act 1998 which make exclusions of a general nature<sup>2</sup>.

The exclusions referred to above relate to:

- (1) planning obligations<sup>3</sup>;
- (2) EEA regulated markets<sup>4</sup>;
- (3) services of general economic interest or having the character of a revenue-producing monopoly<sup>5</sup>;
- (4) agreements made in order to comply with legal requirements<sup>6</sup>;
- (5) avoidance of conflict with international obligations<sup>7</sup>;
- (6) exceptional and compelling reasons of public policy<sup>8</sup>;
- (7) coal and steel<sup>9</sup>;
- (8) agricultural products<sup>10</sup>.

1 As to the Chapter I prohibition see PARA 116.

2 Competition Act 1998 s 3(1)(c). The exclusions are set out in Sch 3: see the text and notes 3-10. The Secretary of State may at any time by order amend Sch 3, with respect to the Chapter I prohibition, by: (1) providing for one or more additional exclusions; or (2) amending or removing any provision added by an order under this provision, or included in Sch 3 para 1, 2, 8 or 9: s 3(3). The power under s 3(3) to provide for an additional exclusion may be exercised only if it appears to the Secretary of State that agreements which fall within the additional exclusion: (a) do not in general have an adverse effect on competition; or (b) are, in general, best considered under Chapter II (see PARAS 125-128) or the Enterprise Act 2002 (see PARA 171 et seq): Competition Act 1998 s 3(4) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (2)). Such an order may include provision (similar to that made with respect to any other exclusion provided by the Competition Act 1998 Sch 3) for the exclusion concerned to cease to apply to a particular agreement: s 3(5). Schedule 3 also gives the Secretary of State power to exclude agreements from the Chapter I prohibition in certain circumstances: s 3(6). As to the Secretary of State see PARA 5.

3 See the Competition Act 1998 Sch 3 para 1. 'Planning obligation' means a planning obligation for the purposes of the Town and Country Planning Act 1990 s 106 (see **TOWN AND COUNTRY PLANNING** vol 46(1) (Reissue) PARAS 244, 245); Competition Act 1998 Sch 3 para 1(2).

4 See the Competition Act 1998 Sch 3 para 3 (amended by SI 2007/126). 'EEA regulated market' means a market which: (1) is listed by an EEA state other than the United Kingdom pursuant to EC Directive 2004/39 of the European Parliament and Council on markets in financial instruments (OJ L145, 30.4.2004, p 1) art 47; and (2) operates without any requirement that a person dealing on the market should have a physical presence in the EEA state from which any trading facilities are provided or on any trading floor that the market may have; 'EEA state' means a state which is a contracting party to the EEA Agreement (see PARA 123 note 2); Competition Act 1998 Sch 3 para 3(5) (as so amended).

5 See the Competition Act 1998 Sch 3 para 4.

6 See the Competition Act 1998 Sch 3 para 5.

7 See the Competition Act 1998 Sch 3 para 6. Exclusion under this head is by order of the Secretary of State, and may relate to a particular agreement or agreements of a particular description: see Sch 3 para 6(1). The order may provide for exclusion only in specified circumstances: see Sch 3 para 6(2). It may also provide that the Chapter I prohibition is to be deemed never to have applied: see Sch 3 para 6(3).

8 See the Competition Act 1998 Sch 3 para 7. Exclusion under this head is by order of the Secretary of State, and may relate to a particular agreement or agreements of a particular description: see Sch 3 para 7(1). The order may provide for exclusion only in specified circumstances: see Sch 3 para 7(2). It may also provide that the Chapter I prohibition is to be deemed never to have applied: see Sch 3 para 7(3). See the Competition Act 1998 (Public Policy Exclusion) Order 2006, SI 2006/605; the Competition Act 1998 (Public Policy Exclusion) Order 2007, SI 2007/1896; and the Competition Act 1998 (Public Policy Exclusion) Order 2008, SI 2008/1820.

9 See the Competition Act 1998 Sch 3 para 8.

10 See the Competition Act 1998 Sch 3 para 9 (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (51); and SI 2004/1261). This exclusion applies to an agreement to the extent to which it relates to production of or trade in an agricultural product and: (1) forms an integral part of a national market organisation; (2) is necessary for the attainment of the objectives set out in the EC Treaty art 33; or (3) is an agreement of farmers or farmers' associations (or associations of such associations) belonging to a single member state which concerns the production or sale of agricultural products, or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices: see the Competition Act 1998 Sch 3 para 9(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/121. Block exemptions.

## **121. Block exemptions.**

If agreements which fall within a particular category of agreement are, in the opinion of the Office of Fair Trading (the 'OFT')<sup>1</sup>, likely to be exempt agreements<sup>2</sup>, the OFT may recommend that the Secretary of State make an order specifying that category for the purposes of this provision<sup>3</sup>. The Secretary of State may make an order ('a block exemption order') giving effect to such a recommendation in the form in which the recommendation is made, or subject to such modifications as he considers appropriate<sup>4</sup>. An agreement which falls within a category specified<sup>5</sup> in a block exemption order is exempt from the Chapter I prohibition<sup>6</sup>. An exemption under this provision is referred to in Part I of the Competition Act 1998 as a 'block exemption'<sup>7</sup>.

A block exemption order may impose conditions or obligations subject to which a block exemption is to have effect<sup>8</sup>. A block exemption order may provide:

- (1) that breach of a condition imposed by the order has the effect of cancelling the block exemption in respect of an agreement<sup>9</sup>;



(2) that if there is a failure to comply with an obligation imposed by the order, the OFT may, by notice in writing, cancel the block exemption in respect of the agreement<sup>10</sup>;

(3) that if the OFT considers that a particular agreement is not an exempt agreement<sup>11</sup>, it may cancel the block exemption in respect of that agreement<sup>12</sup>.

A block exemption order may provide that the order is to cease to have effect at the end of a specified period<sup>13</sup>. A block exemption order may provide for a block exemption to have effect from a date earlier than that on which the order is made<sup>14</sup>.

If, in the opinion of the OFT, it is appropriate to vary or revoke a block exemption order it may make a recommendation to that effect to the Secretary of State<sup>15</sup>. Before exercising his power to vary or revoke a block exemption order (in a case where no such recommendation has been made), the Secretary of State must inform the OFT of the proposed variation or revocation; and take into account any comments made by the OFT<sup>16</sup>.

One block exemption has been made by the Secretary of State, in relation to public transport ticketing schemes<sup>17</sup>.

1 As to the OFT see PARAS 6-8.

2 'Exempt agreement' means an agreement which is exempt from the Chapter I prohibition as a result of the Competition Act 1998 s 9 (see PARA 122): s 6(8) (substituted by SI 2004/1261). As to the Chapter I prohibition see PARA 116.

3 Competition Act 1998 s 6(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (5)(a); and SI 2004/1261). As to the Secretary of State see PARA 5. Before making a recommendation under the Competition Act 1998 s 6(1), the OFT must publish details of its proposed recommendation in such a way as it thinks most suitable for bringing it to the attention of those likely to be affected, and consider any representations about it which are made to it: s 8(1) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (7)).

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq, and particularly PARA 67. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

4 Competition Act 1998 s 6(2). If the Secretary of State proposes to give effect to such a recommendation subject to modifications, he must inform the OFT of the proposed modifications and take into account any comments made by the OFT: s 8(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (7)(a)).

5 'Specified' means specified in a block exemption order: Competition Act 1998 s 6(8) (substituted by SI 2004/1261).

6 Competition Act 1998 s 6(3).

7 Competition Act 1998 s 6(4).

8 Competition Act 1998 s 6(5).

9 Competition Act 1998 s 6(6)(a).

10 Competition Act 1998 s 6(6)(b) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (5)).

11 See note 2.

12 Competition Act 1998 s 6(6)(c) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (5)).

13 Competition Act 1998 s 6(7).

14 Competition Act 1998 s 8(6).

15 Competition Act 1998 s 8(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (7)). The Competition Act 1998 s 8(1) (see note 3) also applies to any proposed recommendation under s 8(3): s 8(4).

16 Competition Act 1998 s 8(5) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (7)).

17 See the Competition Act 1998 (Public Transport Ticketing Schemes Block Exemption) Order 2001, SI 2001/319 (amended by SI 2005/3347).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/122. Exempt agreements.

## **122. Exempt agreements.**

An agreement is exempt from the Chapter I prohibition<sup>1</sup> if it contributes to improving production or distribution, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit<sup>2</sup>. The agreement must not impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, or afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question<sup>3</sup>.

In any proceedings in which it is alleged that the Chapter I prohibition is being or has been infringed by an agreement, any undertaking or association of undertakings claiming that the agreement is exempt bears the burden of proving that the above conditions are satisfied<sup>4</sup>.

1 As to the Chapter I prohibition see PARA 116.

2 Competition Act 1998 s 9(1)(a) (s 9 substituted by SI 2004/1261).

3 Competition Act 1998 s 9(1)(b) (as substituted: see note 2).

4 Competition Act 1998 s 9(2) (as substituted: see note 2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/123. Parallel exemptions.

## **123. Parallel exemptions.**

An agreement is exempt from the Chapter I prohibition<sup>1</sup> if it is exempt from the Community prohibition<sup>2</sup> by virtue of a Regulation or because of a decision of the European Commission under the EC Competition Regulation<sup>3</sup>. An agreement is exempt from the Chapter I prohibition if it does not affect trade between member states but otherwise falls within a category of agreement which is exempt from the Community prohibition by virtue of a Regulation<sup>4</sup>. An exemption from the Chapter I prohibition under this provision is known<sup>5</sup> as a 'parallel exemption'<sup>6</sup>.

A parallel exemption takes effect on the date on which the relevant exemption from the Community prohibition takes effect (or, as the case may be<sup>7</sup>, would take effect if the agreement in question affected trade between member states)<sup>8</sup>. It ceases to have effect if the relevant exemption from the Community prohibition ceases to have effect, or on being cancelled as described below<sup>9</sup>.

In such circumstances and manner as may be specified<sup>10</sup>, the Office of Fair Trading (the 'OFT')<sup>11</sup> may: (1) impose conditions or obligations subject to which a parallel exemption is to have

effect<sup>12</sup>; (2) vary or remove any such condition or obligation<sup>13</sup>; (3) impose one or more additional conditions or obligations<sup>14</sup>; or (4) cancel the exemption<sup>15</sup>. In such circumstances as may be specified<sup>16</sup>, the date from which cancellation of an exemption is to take effect may be earlier than the date on which notice of cancellation is given<sup>17</sup>. Breach of a condition imposed by the OFT has the effect of cancelling the exemption<sup>18</sup>. In exercising its powers, the OFT may require any person who is a party to the agreement in question to give it such information as it may require<sup>19</sup>.

1 As to the Chapter I prohibition see PARA 116.

2 In the Competition Act 1998 s 10, 'Community prohibition' means the prohibition contained in (1) the EC Treaty art 81(1); (2) any corresponding provision replacing, or otherwise derived from, that provision; (3) such other Regulation as the Secretary of State may by order specify: Competition Act 1998 s 10(10) (amended by SI 2004/1261). 'Regulation' means a Regulation adopted by the European Commission or by the Council of the European Union: Competition Act 1998 ss 10(10), 59(1). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

For the purpose of the Competition Act 1998 s 10, references to an agreement being exempt from the Community prohibition are to be read as including references to the prohibition being inapplicable to the agreement by virtue of a Regulation (other than EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation')) or a decision by the European Commission: Competition Act 1998 s 10(9) (amended by SI 2004/1261).

The Competition Act 1998 s 10 has effect in relation to the prohibition contained in the EEA Agreement art 53 para 1 (and the EFTA Surveillance Authority) as it has effect in relation to the Community prohibition (and the Commission) subject to any modifications which the Secretary of State may by order prescribe: Competition Act 1998 s 10(11). 'EEA Agreement' means the Agreement on the European Economic Area (Oporto, 2 May 1992 (Cm 2073; OJ L1, 3.1.94, p 3)) as it has effect for the time being: Competition Act 1998 s 59(1).

As to the Secretary of State see PARA 5. As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

3 Competition Act 1998 s 10(1) (amended by SI 2004/1261). As to the EC Competition Regulation see note 2.

4 Competition Act 1998 s 10(2).

5 Ie in the Competition Act 1998 Pt I (ss 1-60).

6 Competition Act 1998 ss 10(3), 59(1).

7 Ie in the case of a parallel exemption under the Competition Act 1998 s 10(2) (see the text to note 4).

8 Competition Act 1998 s 10(4)(a).

9 Competition Act 1998 s 10(4)(b). As to cancellation see s 10(5), (7); and the text and notes 11-15, 18.

10 Ie in rules made under the Competition Act 1998 s 51 (see PARA 144). See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751, Schedule r 12.

11 Competition Act 1998 s 10(5) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (8)). As to the OFT see PARAS 6-8.

12 Competition Act 1998 s 10(5)(a).

13 Competition Act 1998 s 10(5)(b).

14 Competition Act 1998 s 10(5)(c).

15 Competition Act 1998 s 10(5)(d).

16 See note 10.

17 Competition Act 1998 s 10(6).

18 Competition Act 1998 s 10(7) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (8)).

19 Competition Act 1998 s 10(8) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (8)). For the purposes of the Competition Act 1998 Pt I, the power to require information, in relation to information recorded otherwise than in a legible form, includes power to require a copy of it in a legible form: s 59(3). Any power conferred on the OFT by Pt I to require information includes power to require any document which it believes may contain that information: s 59(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (44)). As to the meaning of 'person' see PARA 118 note 8. As to the meaning of 'information' see PARA 9 note 3.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(2) THE CHAPTER I PROHIBITION/124. Exemption for certain other agreements.

#### **124. Exemption for certain other agreements.**

The fact that a ruling may be given by virtue of the EC Treaty<sup>1</sup> on the question whether or not agreements of a particular kind are prohibited by the Treaty<sup>2</sup> does not prevent such agreements from being subject to the Chapter I prohibition<sup>3</sup>. However, the Secretary of State<sup>4</sup> may by regulations make such provision as he considers appropriate for the purpose of granting an exemption from the Chapter I prohibition, in prescribed circumstances, in respect of such agreements<sup>5</sup>.

The circumstances in which agreements in relation to which a ruling may be given by virtue of the Treaty are exempt from the Chapter I prohibition are that the Office of Fair Trading (the 'OFT')<sup>6</sup> has not found that an agreement which would otherwise benefit from such an exemption has effects in the United Kingdom<sup>7</sup>, or a part of it, which are incompatible with the criteria laid down<sup>8</sup> for exempt agreements<sup>9</sup>.

An exemption under these provisions takes effect on the date on which the relevant exemption from the Community prohibition takes effect<sup>10</sup>. However, it may, if the OFT considers it appropriate and so determines, take effect from a date specified by the OFT which is earlier than the date on which the exemption from the Community prohibition takes effect<sup>11</sup>. It ceases to have effect on the date on which the relevant exemption from the Community prohibition otherwise ceases to have effect or a finding is made by the OFT that the agreement to which the relevant exemption relates has effects in the United Kingdom, or a part of it, which are incompatible with the criteria for exempt agreements<sup>12</sup>.

1     I.e. the EC Treaty art 84. As to the EC Treaty (i.e. the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

2     I.e. by the EC Treaty art 81(1). See further PARA 123 note 2.

3     Competition Act 1998 s 11(1) (amended by SI 2004/1261). As to the Chapter I prohibition see PARA 116.

4     As to the Secretary of State see PARA 5.

5     Competition Act 1998 s 11(2). An exemption from the Chapter I prohibition by virtue of such regulations is referred to in Pt I (ss 1-60) as a 'section 11 exemption': ss 11(3), 59(1). As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

6     As to the OFT see PARAS 6-8.

7     As to the meaning of 'United Kingdom' see PARA 401 note 1.

8     I.e. in the Competition Act 1998 s 9 (see PARA 122).

9 Competition Act 1998 (Section 11 Exemption) Regulations 2001, SI 2001/2993, reg 3(1) (amended by SI 2007/1846). The OFT may not make such a finding otherwise than in the manner specified in what is now the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751, Schedule r 12: see the Competition Act 1998 (Section 11 Exemption) Regulations 2001, SI 2001/2993, reg 3(4).

10 Competition Act 1998 (Section 11 Exemption) Regulations 2001, SI 2001/2993, reg 3(2)(a).

11 Competition Act 1998 (Section 11 Exemption) Regulations 2001, SI 2001/2993, reg 3(3).

12 Competition Act 1998 (Section 11 Exemption) Regulations 2001, SI 2001/2993, reg 3(2)(b) (amended by SI 2007/1846).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(3) THE CHAPTER II PROHIBITION/125. The prohibition.

### (3) THE CHAPTER II PROHIBITION

#### 125. The prohibition.

Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position<sup>1</sup> in a market is prohibited if it may affect trade within the United Kingdom<sup>2</sup>. Conduct may, in particular, constitute such an abuse if it consists in<sup>3</sup>:

- (1) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions<sup>4</sup>;
- (2) limiting production, markets or technical development to the prejudice of consumers<sup>5</sup>;
- (3) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage<sup>6</sup>;
- (4) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of the contracts<sup>7</sup>.

This prohibition is referred to as the 'Chapter II prohibition'<sup>8</sup>. The Chapter II prohibition does not apply to certain excluded cases<sup>9</sup>.

The Office of Fair Trading (the 'OFT')<sup>10</sup> has published numerous Guidelines on the operation of the Act<sup>11</sup>.

1 In the Competition Act 1998 s 18, 'dominant position' means a dominant position within the United Kingdom: s 18(3). 'United Kingdom' means the United Kingdom or any part of it: s 18(3). As to the meaning of 'United Kingdom' see PARA 401 note 1.

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq, and particularly PARA 68 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150. For a decision in which the relevant provisions both of the EC Treaty and the Competition Act 1998 were considered see *Hendry v World Professional Billiards and Snooker Association* [2001] All ER (D) 71 (Oct) (abuse of dominant position by governing body of sport: see PARA 49). There must be an element of abusive behaviour in order to establish an abuse of a dominant position: *Getmapping plc v Ordnance Survey* [2002] EWHC 1089 (Ch), [2003] ICR 1 (use of funds acquired as a result of a position of dominance in one market in order to enter another market at advantage not an automatic abuse).

2 Competition Act 1998 s 18(1).

- 3 Competition Act 1998 s 18(2).
- 4 Competition Act 1998 s 18(2)(a).
- 5 Competition Act 1998 s 18(2)(b).
- 6 Competition Act 1998 s 18(2)(c).
- 7 Competition Act 1998 s 18(2)(d).
- 8 Competition Act 1998 ss 18(4), 59(1).
- 9 See PARA 126.
- 10 As to the Office of Fair Trading see PARAS 6-8.
- 11 See in particular OFT Guideline 402 *Abuse of a Dominant Position* (December 2004); OFT Guideline 403 *Market Definition* (December 2004); OFT Guideline 414a *Assessment of Conduct* (April 2004); OFT Guideline 415 *Assessment of Market Power* (December 2004).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(3) THE CHAPTER II PROHIBITION/126. Excluded cases: introductory.

## **126. Excluded cases: introductory.**

The Chapter II prohibition<sup>1</sup> does not apply in any of the cases in which it is excluded by or as a result of certain specified provisions<sup>2</sup>; these provisions relate to mergers and concentrations<sup>3</sup> and general exclusions<sup>4</sup>. The Financial Services and Markets Act 2000 provides for further exclusions from the Chapter II prohibition<sup>5</sup>.

Provision is made for amendment to be made by the Secretary of State to these exclusions<sup>6</sup>.

- 1 As to the Chapter II prohibition see PARA 125.
- 2 Competition Act 1998 s 19(1).
- 3 Competition Act 1998 s 19(1), Sch 1.
- 4 Competition Act 1998 Sch 3. The exclusions provided for by this Schedule consist of services of general economic interest (see Sch 3 para 4); compliance with legal requirements (see Sch 3 para 5); avoidance of conflict with international obligations (see Sch 3 para 6); public policy (see Sch 3 para 7); and coal and steel (see Sch 3 para 8).
- 5 See PARA 117 text and note 4.
- 6 See PARAS 127-128.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(3) THE CHAPTER II PROHIBITION/127. Excluded cases: mergers and concentrations.

## **127. Excluded cases: mergers and concentrations.**

To the extent to which conduct (either on its own or when taken together with other conduct) results in any two enterprises ceasing to be distinct enterprises<sup>1</sup>, or is directly related and necessary to the attainment of that result, the Chapter II prohibition<sup>2</sup> does not apply to that conduct<sup>3</sup>.

To the extent to which conduct (either on its own or when taken together with other conduct) gives rise to, or would if pursued give rise to, a concentration<sup>4</sup>, the Chapter II prohibition does not apply to the conduct if the EC Merger Regulation<sup>5</sup> gives the European Commission<sup>6</sup> exclusive jurisdiction in the matter<sup>7</sup>.

1       Ie for the purposes of the Enterprise Act 2002 Pt 3 (ss 22-130): see PARA 176.

2       As to the Chapter II prohibition see PARA 125.

3       Competition Act 1998 s 19(1)(a), Sch 1 para 2(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (50)(b)(ii)). The Enterprise Act 2002 s 26 (see PARA 176) applies with modifications for the purpose of this provision: Competition Act 1998 Sch 1 paras 1(4), 2(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (50)(b)(ii)).

The Secretary of State may at any time by order amend the Competition Act 1998 Sch 1, with respect to the Chapter II prohibition, by: (1) providing for one or more additional exclusions; or (2) amending or removing any provision (whether or not it has been added by an order under this provision): s 19(2). As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq, and particularly PARA 73 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

4       As to the meaning of 'concentration' see PARA 118 note 12.

5       Ie EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') (see PARA 74).

6       See PARA 123 note 2.

7       Competition Act 1998 Sch 1 para 6(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(3) THE CHAPTER II PROHIBITION/128. Excluded cases: general exclusions.

## 128. Excluded cases: general exclusions.

The Chapter II prohibition<sup>1</sup> does not apply in any of the cases in which it is excluded by or as a result of provisions of the Competition Act 1998 which make exclusions of a general nature<sup>2</sup>.

The exclusions referred to above relate to:

- (1) services of general economic interest or having the character of a revenue-producing monopoly<sup>3</sup>;
- (2) conduct engaged in in order to comply with legal requirements<sup>4</sup>;
- (3) avoidance of conflict with international obligations<sup>5</sup>;
- (4) exceptional and compelling reasons of public policy<sup>6</sup>;
- (5) coal and steel<sup>7</sup>.

1       As to the Chapter II prohibition see PARA 125.

2 Competition Act 1998 s 19(1)(b). The exclusions are set out in Sch 3 (see the text and notes 3-7).

3 See the Competition Act 1998 Sch 3 para 4.

4 See the Competition Act 1998 Sch 3 para 5.

5 See the Competition Act 1998 Sch 3 para 6. Exclusion under this head is by order of the Secretary of State, which may provide for exclusion only in specified circumstances: see Sch 3 para 6(4). It may also provide that the Chapter II prohibition is to be deemed never to have applied: see Sch 3 para 6(5). As to the Secretary of State see PARA 5.

6 See the Competition Act 1998 Sch 3 para 7. Exclusion under this head is by order of the Secretary of State, which may provide for exclusion only in specified circumstances: see Sch 3 para 7(4). It may also provide that the Chapter II prohibition is to be deemed never to have applied: see Sch 3 para 7(5).

7 See the Competition Act 1998 Sch 3 para 8.

The Secretary of State may at any time by order amend Sch 3 para 8 with respect to the Chapter II prohibition: s 19(3). Schedule 3 also gives the Secretary of State power to provide that the Chapter II prohibition is not to apply in certain circumstances: s 19(4). As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(4) INVESTIGATION BY THE OFFICE OF FAIR TRADING/129. Power of the Office of Fair Trading to investigate.

## **(4) INVESTIGATION BY THE OFFICE OF FAIR TRADING**

### **129. Power of the Office of Fair Trading to investigate.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may conduct an investigation in any of the following cases<sup>2</sup>:

- (1) where there are reasonable grounds for suspecting that there is an agreement which may affect trade within the United Kingdom<sup>3</sup> and which has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom<sup>4</sup>;
- (2) where there are reasonable grounds for suspecting that there is an agreement which may affect trade between member states and which has as its object or effect the prevention, restriction or distortion of competition within the European Community<sup>5</sup>;
- (3) where there are reasonable grounds for suspecting that the Chapter II prohibition<sup>6</sup> has been infringed<sup>7</sup>;
- (4) where there are reasonable grounds for suspecting that the prohibition on abuse of a dominant position in the EC Treaty<sup>8</sup> has been infringed<sup>9</sup>;
- (5) where there are reasonable grounds for suspecting that, at some time in the past, there was an agreement which at that time may have affected trade within the United Kingdom and had as its object or effect the prevention, restriction or distortion of competition within the United Kingdom<sup>10</sup>;
- (6) where there are reasonable grounds for suspecting that, at some time in the past, there was an agreement which at that time may have affected trade between member states and had as its object or effect the prevention, restriction or distortion of competition within the European Community<sup>11</sup>.

The OFT has published guidance on investigations<sup>12</sup>.



For the purposes of an investigation, the OFT may, by notice in writing, require any person to produce to it a specified<sup>13</sup> document, or to provide it with specified information, which it considers relates to any matter relevant to the investigation<sup>14</sup>. The notice must indicate the subject matter and purpose of the investigation and the nature of the offences created by failure to comply with the notice<sup>15</sup>. The OFT may also specify in the notice the time and place at which any document is to be produced or any information is to be provided and the manner and form in which it is to be produced or provided<sup>16</sup>.

1 As to the OFT see PARAS 6-8.

2 Competition Act 1998 s 25(1) (s 25 substituted by SI 2004/1261).

3 As to the meaning of 'United Kingdom' see PARA 401 note 1.

4 Competition Act 1998 s 25(2) (as substituted: see note 2). Section 25(2) does not permit an investigation to be conducted in relation to an agreement if the OFT: (1) considers that the agreement is exempt from the Chapter I prohibition as a result of a block exemption or a parallel exemption; and (2) does not have reasonable grounds for suspecting that the circumstances may be such that it could exercise its power to cancel the exemption: s 25(8) (as substituted: see note 2). As to the Chapter I prohibition see PARA 116. As to the meaning of 'block exemption' see PARA 121; and as to the meaning of 'parallel exemption' see PARA 123.

5 Competition Act 1998 s 25(3) (as substituted: see note 2). Section 25(3) does not permit an investigation to be conducted if the OFT: (1) considers that the agreement is an agreement to which the prohibition in the EC Treaty art 81(1) (see PARA 61 et seq) is inapplicable by virtue of a regulation of the European Commission (the 'relevant regulation'); and (2) does not have reasonable grounds for suspecting that the conditions set out in EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 29(2) for the withdrawal of the benefit of the relevant regulation may be satisfied in respect of that agreement: Competition Act 1998 s 25(9) (as substituted: see note 2). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

6 As to the Chapter II prohibition see PARA 125.

7 Competition Act 1998 s 25(4) (as substituted: see note 2).

8 Ie the EC Treaty art 82 (see PARA 68).

9 Competition Act 1998 s 25(5) (as substituted: see note 2).

10 Competition Act 1998 s 25(6) (as substituted: see note 2). Section 25(6) does not permit an investigation to be conducted in relation to any agreement if the OFT considers that, at the time in question, the agreement was exempt from the Chapter I prohibition as a result of a block exemption or a parallel exemption: s 25(10) (as substituted: see note 2). It is immaterial for the purposes of s 25(6) or s 25(7) (see head (6) in the text) whether the agreement in question remains in existence: s 25(12) (as substituted: see note 2).

11 Competition Act 1998 s 25(7) (as substituted: see note 2). Section 25(7) does not permit an investigation to be conducted in relation to any agreement if the OFT considers that, at the time in question, the agreement was an agreement to which the prohibition in the EC Treaty art 81(1) (see PARA 61 et seq) was inapplicable by virtue of a regulation of the European Commission: Competition Act 1998 s 25(11) (as substituted: see note 2). See also note 10.

12 See OFT 404 *Powers of investigation* (December 2004).

13 'Specified' means: (1) specified, or described, in the notice; or (2) falling within a category which is specified, or described, in the notice: Competition Act 1998 s 26(4).

14 Competition Act 1998 s 26(1), (2) (s 26(1) amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (20)(a); and SI 2004/1261). The power to require a person to produce a document includes power: (1) if the document is produced, to take copies of it or extracts from it or to require him, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document; (2) if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is: Competition Act 1998 s 26(6). See also the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751, art 2, Schedule r 3 (legal advice during investigations and inspections).

- 15 Competition Act 1998 s 26(3). The offences are those created by ss 42-44 (see PARAS 140-141).
- 16 Competition Act 1998 s 26(5) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (20 (b))).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(4) INVESTIGATION BY THE OFFICE OF FAIR TRADING/130. Power to enter business premises without a warrant.

### **130. Power to enter business premises without a warrant.**

Any officer of the Office of Fair Trading (the 'OFT')<sup>1</sup> who is authorised in writing by the OFT to do so (an 'investigating officer') may enter any business premises<sup>2</sup> in connection with an investigation<sup>3</sup>. No investigating officer is to enter any premises in the exercise of his powers under these provisions unless he has given to the occupier of the premises a written notice<sup>4</sup> which:

- (1) gives at least two working days' notice of the intended entry<sup>5</sup>;
- (2) indicates the subject matter and purpose of the investigation<sup>6</sup>; and
- (3) indicates the nature of certain offences created by failure to comply<sup>7</sup>.

An investigating officer entering any premises under these provisions may:

- (a) take with him such equipment as appears to him to be necessary<sup>8</sup>;
- (b) require any person on the premises (i) to produce any document which he considers relates to any matter relevant to the investigation; and (ii) if the document is produced, to provide an explanation of it<sup>9</sup>;
- (c) require any person to state, to the best of his knowledge and belief, where any such document is to be found<sup>10</sup>;
- (d) take copies of, or extracts from, any document which is produced<sup>11</sup>;
- (e) require any information which is stored in any electronic form and is accessible from the premises and which the investigating officer considers relates to any matter relevant to the investigation, to be produced in a form (i) in which it can be taken away; and (ii) in which it is visible and legible or from which it can readily be produced in a visible and legible form<sup>12</sup>;
- (f) take any steps which appear to be necessary for the purpose of preserving or preventing interference with any document which he considers relates to any matter relevant to the investigation<sup>13</sup>.

A reasonable period may be allowed for an occupier's legal adviser to arrive at the premises before an investigation continues<sup>14</sup>.

1 As to the OFT see PARAS 6-8.

2 'Business premises' means premises (or any part of premises) not used as a dwelling: Competition Act 1998 s 27(6) (added by SI 2004/1261). 'Premises' includes any land or means of transport: Competition Act 1998 s 59(1) (definition substituted by SI 2004/1261). As to the meaning of 'document' see PARA 9 note 3.

3 Competition Act 1998 s 27(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (21)(a); and SI 2004/1261). In certain circumstances the officer may be required to produce evidence of his authorisation and certain other information: see note 4. As to corresponding powers conferred by European Community law see PARA 82.

4 Competition Act 1998 s 27(2). This requirement does not apply: (1) if the OFT has a reasonable suspicion that the premises are, or have been, occupied by (a) a party to an agreement which it is investigating under s 25 (see PARA 129); or (b) an undertaking the conduct of which it is investigating under s 25 (see PARA 129); or (2) if the investigating officer has taken all such steps as are reasonably practicable to give notice but has not been able to do so: s 27(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (21)(a), (b); and SI 2004/1261). In a case falling within the Competition Act 1998 s 27(3), the power of entry conferred by s 27(1) is to be exercised by the investigating officer on production of: (i) evidence of his authorisation; and (ii) a document containing the information referred to in s 27(2)(b) and (c) (see heads (2) and (3) in the text): s 27(4).

5 Competition Act 1998 s 27(2)(a). 'Working day' means a day which is not Saturday, Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom: Competition Act 1998 s 59(1) (definition added by SI 2004/1261).

6 Competition Act 1998 s 27(2)(b).

7 Competition Act 1998 s 27(2)(c). The offences are those created by ss 42-44 (see PARAS 140-141).

8 Competition Act 1998 s 27(5)(a).

9 Competition Act 1998 s 27(5)(b).

10 Competition Act 1998 s 27(5)(c).

11 Competition Act 1998 s 27(5)(d).

12 Competition Act 1998 s 27(5)(e) (amended by the Criminal Justice and Police Act 2001 s 70, Sch 2 para 21(a), (b)). As to the meaning of 'information' see PARA 9 note 3.

13 Competition Act 1998 s 27(5)(f) (added by SI 2004/1261).

14 See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751, art 2, Schedule r 3.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(4) INVESTIGATION BY THE OFFICE OF FAIR TRADING/131. Power to enter business or domestic premises under a warrant.

### **131. Power to enter business or domestic premises under a warrant.**

On an application made by the Office of Fair Trading (the 'OFT')<sup>1</sup> to the court<sup>2</sup> in accordance with rules of court, a judge may issue a warrant<sup>3</sup> if he is satisfied that:

(1) there are reasonable grounds for suspecting that there are on any business premises<sup>4</sup> or domestic premises<sup>5</sup> documents<sup>6</sup> the production of which has been required in connection with an investigation<sup>7</sup>, and which have not been produced as required<sup>8</sup>;

(2) there are reasonable grounds for suspecting that there are on any business premises or domestic premises documents which the OFT has power to require to be produced<sup>9</sup>, and that if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed<sup>10</sup>; or

(3) in relation to business premises only, an investigating officer<sup>11</sup> has attempted to enter premises in the exercise of his power to enter without a warrant<sup>12</sup> but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required<sup>13</sup>.

A warrant under these provisions must authorise a named officer of the OFT, and any other of the OFT's officers whom the OFT has authorised in writing to accompany the named officer<sup>14</sup>:

- (a) to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose<sup>15</sup>;
- (b) to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application was granted (the 'relevant kind')<sup>16</sup>;
- (c) to take possession of any documents appearing to be of the relevant kind if (i) such action appears to be necessary for preserving the documents or preventing interference with them; or (ii) it is not reasonably practicable to take copies of the documents on the premises<sup>17</sup>;
- (d) to take any other steps which appear to be necessary for preserving the documents or preventing interference with them<sup>18</sup>;
- (e) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found<sup>19</sup>;
- (f) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form (i) in which it can be taken away; and (ii) in which it is visible and legible or from which it can readily be produced in a visible and legible form<sup>20</sup>.

The warrant must indicate the subject matter and purpose of the investigation, and the nature of certain offences created by failure to comply<sup>21</sup>.

Any person entering premises by virtue of a warrant may take with him such equipment as appears to him to be necessary<sup>22</sup>. On leaving any premises which he has entered by virtue of a warrant, the named officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them<sup>23</sup>. A warrant continues in force until the end of the period of one month beginning with the day on which it is issued<sup>24</sup>.

If there is no one at the premises when the named officer proposes to execute the warrant he must, before executing it, take such steps as are reasonable in all the circumstances to inform the occupier<sup>25</sup> of the intended entry, and if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed<sup>26</sup>.

1 As to the OFT see PARAS 6-8.

2 'Court' means, in England and Wales, the High Court: Competition Act 1998 s 59(1).

3 Competition Act 1998 s 28(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (22)(a)); Competition Act 1998 s 28A(1) (added by SI 2004/1261). The powers conferred by the Competition Act 1998 ss 28, 28A are to be exercised on production of a warrant issued thereunder: s 29(2) (amended by SI 2004/1261).

4 As to the meaning of 'business premises' see PARA 130 note 2; definition applied by the Competition Act 1998 s 28(8) (added by SI 2004/1261).

5 'Domestic premises' means premises (or any part of premises) that are used as a dwelling and are: (1) premises also used in connection with the affairs of an undertaking or association of undertakings; or (2) premises where documents relating to the affairs of an undertaking or association of undertakings are kept: Competition Act 1998 s 28A(9) (added by SI 2004/1261).

6 As to the meaning of 'document' see PARA 9 note 3.

7 Ie required under the Competition Act 1998 s 26 or s 27 (see PARAS 129-130).

8 Competition Act 1998 ss 28(1)(a), 28A(1)(a) (s 28(1)(a) amended, and s 28A(1)(a) added, by SI 2004/1261).

9 le under the Competition Act 1998 s 26 (see PARA 129).

10 Competition Act 1998 s 28(1)(b) (s 28(1)(b) amended by the Enterprise Act 2002 Sch 25 para 38(1), (22)(a); and SI 2004/1261); Competition Act 1998 s 28A(1)(b) (added by SI 2004/1261). If, in the case of a warrant under head (2) in the text, the judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation concerned, the warrant must also authorise action mentioned in the Competition Act 1998 ss 28(2), 28A(2) to be taken in relation to any such document: ss 28(3), 28A(3) (added by SI 2004/1261).

11 As to the meaning of 'investigating officer' see PARA 130.

12 le his power under the Competition Act 1998 s 27 (see PARA 130).

13 Competition Act 1998 s 28(1)(c).

14 Competition Act 1998 s 28(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (22)(b)); Competition Act 1998 s 28A(2) (added by SI 2004/1261). A warrant may authorise persons specified in the warrant to accompany the named officer who is executing it: Competition Act 1998 s 28(3A) (added by the Enterprise Act 2002 s 203(1), (2)); Competition Act 1998 s 28A(4) (added by SI 2004/1261).

15 Competition Act 1998 ss 28(2)(a), 28A(2)(a) (added by SI 2004/1261). See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751, art 2, Schedule r 3. The rights to enter and search premises under the Competition Act 1998 do not infringe the rights to a fair trial and respect for private life under the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953) Cmd 8969) arts 6, 8: *Office of Fair Trading v X* [2003] EWHC 1042 (Comm), [2003] 2 All ER (Comm) 183, [2004] ICR 105.

16 Competition Act 1998 ss 28(2)(b), 28A(2)(b) (added by SI 2004/1261).

17 Competition Act 1998 ss 28(2)(c), 28A(2)(c) (added by SI 2004/1261). Any document of which possession is taken under head (c) in the text may be retained for a period of three months: Competition Act 1998 ss 28(7), 28A(8) (added by SI 2004/1261).

18 Competition Act 1998 ss 28(2)(d), 28A(2)(d) (added by SI 2004/1261).

19 Competition Act 1998 ss 28(2)(e), 28A(2)(e) (added by SI 2004/1261).

20 Competition Act 1998 s 28(2)(f) (amended by the Criminal Justice and Police Act 2001 s 70, Sch 2 Pt 2 para 21); Competition Act 1998 s 28A(2)(f) (added by SI 2004/1261). As to the meaning of 'information' see PARA 9 note 3.

21 See the Competition Act 1998 s 29(1) (amended by SI 2004/1261), which refers to offences created by the Competition Act 1998 ss 42-44 (see PARAS 140-141).

22 Competition Act 1998 ss 28(4), 28A(5) (added by SI 2004/1261).

23 Competition Act 1998 ss 28(5), 28A(6) (added by SI 2004/1261).

24 Competition Act 1998 ss 28(6), 28A(7) (added by SI 2004/1261).

25 'Occupier', in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises: Competition Act 1998 s 29(5).

26 Competition Act 1998 s 29(3). If the named officer is unable to inform the occupier of the intended entry he must, when executing the warrant, leave a copy of it in a prominent place on the premises: s 29(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(4) INVESTIGATION BY THE OFFICE OF FAIR TRADING/132. Privileged communications and use of statements.

## 132. Privileged communications and use of statements.

A person<sup>1</sup> will not be required, under any provision of Part I of the Competition Act 1998<sup>2</sup>, to produce or disclose a privileged communication<sup>3</sup>.

A statement made by a person in response to a requirement imposed in connection with an investigation<sup>4</sup> may not be used in evidence against him on a prosecution for a cartel offence<sup>5</sup> unless, in the proceedings: (1) in giving evidence, he makes a statement inconsistent with it; and (2) evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf<sup>6</sup>.

1 As to the meaning of 'person' see PARA 118 note 8.

2 I.e. the Competition Act 1998 ss 1-60.

3 Competition Act 1998 s 30(1). 'Privileged communication' means a communication: (1) between a professional legal adviser and his client; or (2) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings, which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege: s 30(2). See **CIVIL PROCEDURE** vol 11 (2009) PARA 558 et seq.

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq, particularly PARA 93. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

4 I.e. by virtue of any of the Competition Act 1998 ss 26-28A (see PARAS 129-131).

5 I.e. an offence under the Enterprise Act 2002 s 188 (see PARA 319).

6 Competition Act 1998 s 30A (added by the Enterprise Act 2002 s 198; and amended by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(4) INVESTIGATION BY THE OFFICE OF FAIR TRADING/133. Decisions following an investigation.

### **133. Decisions following an investigation.**

If, as the result of an investigation<sup>1</sup>, the Office of Fair Trading (the 'OFT')<sup>2</sup> proposes to make a decision: (1) that the Chapter I prohibition<sup>3</sup> has been infringed; (2) that the Chapter II prohibition<sup>4</sup> has been infringed; (3) that the prohibition against restriction or distortion of competition in the EC Treaty<sup>5</sup> has been infringed; or (4) that the prohibition against abuse of a dominant position<sup>6</sup> in the EC Treaty<sup>7</sup>, the OFT must give written notice to the person<sup>8</sup> (or persons) likely to be affected by the proposed decision and give that person (or those persons) an opportunity to make representations<sup>9</sup>.

1 See PARA 129.

2 As to the OFT see PARAS 6-8.

3 As to the Chapter I prohibition see PARA 116.

4 As to the Chapter II prohibition see PARA 125.

5 I.e. the EC Treaty art 81 (see PARA 61 et seq). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

6 I.e. the EC Treaty art 82 (see PARA 68 et seq).

- 7 Competition Act 1998 s 31(1) (substituted by SI 2004/1261).
- 8 As to the meaning of 'person' see PARA 118 note 8.
- 9 Competition Act 1998 s 31(2) (substituted by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(4) INVESTIGATION BY THE OFFICE OF FAIR TRADING/134. Commitments.

### **134. Commitments.**

Where the Office of Fair Trading (the 'OFT')<sup>1</sup> has begun an investigation<sup>2</sup> but has not made a decision as to infringement<sup>3</sup>, then for the purposes of addressing the competition concerns it has identified, the OFT may accept from such person<sup>4</sup> (or persons) concerned as it considers appropriate commitments to take such action (or refrain from taking such action) as it considers appropriate<sup>5</sup>. At any time when commitments are in force the OFT may accept from the person (or persons) who gave the commitments: (1) a variation of them if it is satisfied that the commitments as varied will address its current competition concerns; (2) commitments in substitution for them if it is satisfied that the new commitments will address its current competition concerns<sup>6</sup>. Commitments come into force when accepted, and may be released by the OFT where it is requested to do so by the person (or persons) who gave the commitments or it has reasonable grounds for believing that the relevant competition concerns no longer arise<sup>7</sup>.

If the OFT has accepted commitments, and has not released them, the OFT must not continue the investigation, make a decision regarding infringement<sup>8</sup> or give a direction<sup>9</sup>, in relation to the agreement or conduct which was the subject of the investigation<sup>10</sup>. This provision does not prevent the OFT from taking any action in relation to competition concerns which are not addressed by commitments accepted by it<sup>11</sup>. This provision also does not prevent the OFT from continuing the investigation, making a decision, or giving a direction where: (a) it has reasonable grounds for believing that there has been a material change of circumstances since the commitments were accepted; (b) it has reasonable grounds for suspecting that a person has failed to adhere to one or more of the terms of the commitments; or (c) it has reasonable grounds for suspecting that information which led it to accept the commitments was incomplete, false or misleading in a material particular<sup>12</sup>.

Where the OFT is reviewing or has reviewed the effectiveness of commitments accepted, it must, if requested to do so by the Secretary of State<sup>13</sup>, prepare a report of its findings<sup>14</sup>.

The OFT must prepare and publish guidance as to the circumstances in which it may be appropriate to accept commitments<sup>15</sup>. The OFT may at any time alter the guidance<sup>16</sup> and, if the guidance is altered, the OFT must publish it as altered<sup>17</sup>. No guidance is to be published without the approval of the Secretary of State<sup>18</sup>. The OFT may, after consulting the Secretary of State, choose how it publishes its guidance<sup>19</sup>. If the OFT is preparing or altering guidance it must consult such persons as it considers appropriate<sup>20</sup>. If the proposed guidance or alteration relates to a matter in respect of which a regulator<sup>21</sup> exercises concurrent jurisdiction, those consulted must include that regulator<sup>22</sup>. When exercising its discretion to accept commitments, the OFT must have regard to the guidance for the time being in force<sup>23</sup>.

If a person from whom the OFT has accepted commitments fails without reasonable excuse to adhere to the commitments (and has not been released from them), the OFT may apply to the court<sup>24</sup> for an order: (i) requiring the defaulter to make good his default within a time specified

in the order; or (ii) if the commitments relate to anything to be done in the management or administration of an undertaking, requiring the undertaking or any of its officers to do it<sup>25</sup>.

- 1 As to the OFT see PARAS 6-8.
- 2 Ie under the Competition Act 1998 s 25 (see PARA 129).
- 3 Ie a decision under s 31(2) (see PARA 133).
- 4 As to the meaning of 'person' see PARA 118 note 8.
- 5 Competition Act 1998 s 31A(1), (2) (ss 31A-31E added by SI 2004/1261). As to the procedural requirements for the acceptance, variation and release of commitments see the Competition Act 1998 s 31A(5), Sch 6A (added by SI 2004/1261).
- 6 Competition Act 1998 s 31A(3) (as added: see note 5).
- 7 Competition Act 1998 s 31A(4) (as added: see note 5).
- 8 Ie under the Competition Act 1998 s 31(2) (see PARA 133).
- 9 Ie under the Competition Act 1998 s 35 (see PARA 136).
- 10 Competition Act 1998 s 31B(1), (2) (as added: see note 5), which is expressed to be subject to s 31B(3), (4) (see the text and notes 11-12).
- 11 Competition Act 1998 s 31B(3) (as added: see note 5).
- 12 Competition Act 1998 s 31B(4) (as added: see note 5). If, pursuant to s 31B(4), the OFT makes a decision or gives a direction the commitments are to be treated as released from the date of that decision or direction: s 31B(5) (as added: see note 5).
- 13 As to the Secretary of State see PARA 5.
- 14 Competition Act 1998 s 31C(1) (as added: see note 5). The OFT must give any report prepared by it to the Secretary of State and publish the report: s 31C(2) (as added: see note 5).
- 15 Competition Act 1998 s 31D(1) (as added: see note 5). See OFT Guideline 407 *Enforcement* (December 2004).
- 16 Competition Act 1998 s 31D(2) (as added: see note 5).
- 17 Competition Act 1998 s 31D(3) (as added: see note 5).
- 18 Competition Act 1998 s 31D(4) (as added: see note 5).
- 19 Competition Act 1998 s 31D(5) (as added: see note 5).
- 20 Competition Act 1998 s 31D(6) (as added: see note 5).
- 21 As to the meaning of 'regulator' see PARA 147.
- 22 Competition Act 1998 s 31D(7) (as added: see note 5).
- 23 Competition Act 1998 s 31D(8) (as added: see note 5).
- 24 As to the meaning of 'court' see PARA 131 note 2.
- 25 Competition Act 1998 s 31E(1) (as added: see note 5). An order of the court may provide for all the costs of, or incidental to, the application for the order to be borne by: (1) the person in default; or (2) any officer of an undertaking who is responsible for the default: s 31E(2) (as added: see note 5).



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(5) ENFORCEMENT/135. Directions.

## **(5) ENFORCEMENT**

### **135. Directions.**

If the Office of Fair Trading (the 'OFT')<sup>1</sup> has made a decision that an agreement infringes the Chapter I prohibition<sup>2</sup> or that it infringes the prohibition against restriction or distortion of competition in the EC Treaty<sup>3</sup>, it may give to such person<sup>4</sup> or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end<sup>5</sup>. A direction under this provision may, in particular, include provision requiring the parties to the agreement to modify the agreement, or requiring them to terminate the agreement<sup>6</sup>. A direction under this provision must be given in writing<sup>7</sup>.

If the OFT has made a decision that conduct infringes the Chapter II prohibition<sup>8</sup> or infringes the prohibition against abuse of a dominant position in the EC Treaty<sup>9</sup>, it may give to such person or persons as it considers appropriate such directions as it considers appropriate to bring the infringement to an end<sup>10</sup>. A direction under this provision may, in particular, include provision requiring the person concerned to modify the conduct in question, or requiring him to cease that conduct<sup>11</sup>. A direction under this provision must be given in writing<sup>12</sup>.

If a person fails, without reasonable excuse, to comply with a direction under either of the provisions described above<sup>13</sup>, the OFT may apply to the court<sup>14</sup> for an order<sup>15</sup>:

- (1) requiring the defaulter to make good his default within a time specified in the order<sup>16</sup>; or
- (2) if the direction related to anything to be done in the management or administration of an undertaking, requiring the undertaking or any of its officers<sup>17</sup> to do it<sup>18</sup>.

Provision is made in the OFT's Rules in relation to directions<sup>19</sup>. The OFT has published guidance on enforcement<sup>20</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Chapter I prohibition see PARA 116.

3 Ie the EC Treaty art 81(1) (see PARA 61 et seq). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

4 As to the meaning of 'person' see PARA 118 note 8.

5 Competition Act 1998 s 32(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (24)(a); and SI 2004/1261).

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

6 Competition Act 1998 s 32(3).

7 Competition Act 1998 s 32(4).

8 As to the Chapter II prohibition see PARA 125.

9 Ie the EC Treaty art 82 (see PARA 68 et seq).

10 Competition Act 1998 s 33(1) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (25)(a); and SI 2004/1261).

11 Competition Act 1998 s 33(3).

12 Competition Act 1998 s 33(4).

13 I.e. a direction given under the Competition Act 1998 s 32 or s 33 (see the text and notes 1-12).

14 As to the meaning of 'court' see PARA 131 note 2.

15 Competition Act 1998 s 34(1) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (26)).

16 Competition Act 1998 s 34(1)(a).

17 'Officer', in relation to a body corporate, includes a director, manager or secretary: Competition Act 1998 s 59(1).

18 Competition Act 1998 s 34(1)(b). An order of the court under s 34(1) may provide for all of the costs of, or incidental to, the application for the order to be borne by the person in default or any officer of an undertaking who is responsible for the default: s 34(2).

19 See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751, Schedule r 8. As to such rules generally see PARA 144.

20 See OFT Guideline 407 *Enforcement* (December 2004).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(5) ENFORCEMENT/136. Interim measures.

### **136. Interim measures.**

If the Office of Fair Trading<sup>1</sup> has begun an investigation<sup>2</sup> which it has power to conduct and has not completed it<sup>3</sup>, it may, if it considers that it is necessary for it to act as a matter of urgency for the purpose: (1) of preventing serious, irreparable damage to a particular person or category of person; or (2) of protecting the public interest, give such directions as it considers appropriate for that purpose<sup>4</sup>.

Before giving such a direction, the OFT must give written notice to the person (or persons) to whom it proposes to give the direction, and give that person (or each of them) an opportunity to make representations<sup>5</sup>.

A direction given may, if the circumstances permit, be replaced either by a direction in relation to agreements or conduct<sup>6</sup>, or by commitments accepted by the OFT<sup>7</sup>.

Further provision is made in relation to interim measures by the OFT's Rules<sup>8</sup>.

1 As to the OFT see PARAS 6-8.

2 I.e. under the Competition Act 1998 s 25 (see PARA 129).

3 Competition Act 1998 s 35(1) (substituted by SI 2004/1261). In the case of an investigation conducted by virtue of the Competition Act 1998 s 25(2) or s 25(6) (see PARA 129), s 35 does not apply if a person has produced evidence to the OFT in connection with the investigation that satisfies it on the balance of probabilities that, in the event of it reaching the basic infringement conclusion, it would also reach the conclusion that the suspected agreement is exempt from the Chapter I prohibition as a result of s 9(1) (see PARA 122): s 35(8) (added by SI 2004/1261). For this purpose, the 'basic infringement conclusion' is the conclusion that there is an agreement which: (1) may affect trade within the United Kingdom; and (2) has as its object or effect the prevention, restriction or distortion of competition within the United Kingdom: Competition Act 1998 s

35(8) (as so added). As to the Chapter I prohibition see PARA 116. As to the meaning of 'person' see PARA 118 note 8. As to the meaning of 'United Kingdom' see PARA 401 note 1.

In the case of an investigation conducted by virtue of s 25(3) or s 25(7) (see PARA 129), s 35 does not apply if a person has produced evidence to the OFT in connection with the investigation that satisfies it on the balance of probabilities that, in the event of it reaching the basic infringement conclusion, it would also reach the conclusion that the suspected agreement is an agreement to which the prohibition in the EC Treaty art 81(1) (see PARA 61 et seq) is inapplicable because the agreement satisfies the conditions in art 81(3): Competition Act 1998 s 35(9) (added by SI 2004/1261). For this purpose, the 'basic infringement conclusion' is the conclusion that there is an agreement which: (a) may affect trade between member states; and (b) has as its object or effect the prevention, restriction or distortion of competition within the Community: Competition Act 1998 s 35(9) (as so added). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

4 Competition Act 1998 s 35(2) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (27); and SI 2004/1261). In the cases mentioned in the Competition Act 1998 s 25(2), (3), (6) and (7) (see PARA 129), s 32(3) and s 34 (see PARA 135) also apply to directions given under s 35: s 35(6) (amended by SI 2004/1261). In the cases mentioned in the Competition Act 1998 s 25(4) and (5) (see PARA 129), s 33(3) and s 34 (see PARA 135) also apply to directions given under s 35: s 35(7) (amended by SI 2004/1261).

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

5 Competition Act 1998 s 35(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (27)). Such a notice must indicate the nature of the direction which the OFT is proposing to give and its reasons for wishing to give it: Competition Act 1998 s 35(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (27)).

6 Ie under the Competition Act 1998 s 32 or (as appropriate) s 33 (see PARA 135).

7 Competition Act 1998 s 35(5) (substituted by SI 2004/1261). Otherwise, the direction has effect while the Competition Act 1998 s 35 applies: s 35(5) (as so substituted). Commitments are accepted under s 31A (see PARA 134).

8 See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751, Schedule r 9. As to such rules generally see PARA 144.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(5) ENFORCEMENT/137. Penalties.

### **137. Penalties.**

On making a decision that an agreement has infringed the Chapter I prohibition<sup>1</sup> or the prohibition against restriction or distortion of competition in the EC Treaty<sup>2</sup>, the Office of Fair Trading (the 'OFT')<sup>3</sup> may require an undertaking which is a party to the agreement to pay the OFT a penalty in respect of the infringement<sup>4</sup>. On making a decision that conduct has infringed the Chapter II prohibition<sup>5</sup> or the prohibition against abuse of a dominant position in the EC Treaty<sup>6</sup>, the OFT may require the undertaking concerned to pay the OFT a penalty in respect of the infringement<sup>7</sup>. The OFT may impose a penalty on an undertaking only if the OFT is satisfied that the infringement has been committed intentionally or negligently by the undertaking<sup>8</sup>.

Notice of any such penalty must be in writing, and must specify the date before which the penalty is required to be paid<sup>9</sup>. No such penalty fixed by the OFT may exceed 10 per cent of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)<sup>10</sup>. Any sums received by the OFT are to be paid into the Consolidated Fund<sup>11</sup>.

If the specified date<sup>12</sup> in a penalty notice has passed and: (1) the period during which an appeal against the imposition, or amount, of the penalty may be made has expired without an appeal having been made; or (2) such an appeal has been made and determined, the OFT may recover from the undertaking, as a civil debt due to the OFT, any amount payable under the penalty notice which remains outstanding<sup>13</sup>.

The OFT must prepare and publish guidance as to the appropriate amount of any penalty under Part I of the Competition Act 1998<sup>14</sup>. When setting the amount of such a penalty, the OFT must have regard to the guidance for the time being in force<sup>15</sup>. The OFT may at any time alter the guidance<sup>16</sup>, and if the guidance is altered, the OFT must publish it as altered<sup>17</sup>. No guidance may be so published without the approval of the Secretary of State<sup>18</sup>. If the OFT is preparing or altering guidance it must consult such persons as it considers appropriate<sup>19</sup>. If the proposed guidance or alteration relates to a matter in respect of which a regulator<sup>20</sup> exercises concurrent jurisdiction, those consulted must include that regulator<sup>21</sup>.

If a penalty or a fine has been imposed by the European Commission, or by a court or other body in another member state, in respect of an agreement or conduct, the OFT, an appeal tribunal<sup>22</sup> or the appropriate court<sup>23</sup> must take that penalty or fine into account when setting the amount of a penalty under Part I of the Competition Act 1998 in relation to that agreement or conduct<sup>24</sup>.

1 As to the Chapter I prohibition see PARA 116.

2 I.e. the EC Treaty art 81(1) (see PARA 61 et seq). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

3 As to the OFT see PARAS 6-8.

4 Competition Act 1998 s 36(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (28)(a); and SI 2004/1261). The Competition Act 1998 s 36(1) is subject to s 39 (see PARA 138) and does not apply in relation to a decision that an agreement has infringed the Chapter I prohibition if the OFT is satisfied that the undertaking acted on the reasonable assumption that s 39 gave it immunity in respect of the agreement: s 36(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (28)(a); and SI 2004/1261).

For decisions of the EC Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq, particularly PARA 107 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

5 As to the Chapter II prohibition see PARA 125.

6 I.e. the EC Treaty art 82 (see PARA 68 et seq).

7 Competition Act 1998 s 36(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (28)(a), (b); and SI 2004/1261). The Competition Act 1998 s 36(2) is subject to s 40 (see PARA 139) and does not apply in relation to a decision that conduct has infringed the Chapter II prohibition if the OFT is satisfied that the undertaking acted on the reasonable assumption that s 40 gave it immunity in respect of the conduct: s 36(5) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (28)(a); and SI 2004/1261).

8 Competition Act 1998 s 36(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (28)(a), (c)).

9 Competition Act 1998 s 36(6). The date specified must not be earlier than the end of the period within which an appeal against the notice may be brought under s 46 (see PARA 166); s 36(7).

10 Competition Act 1998 s 36(8) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (28)(a)). See the Competition Act 1998 (Determination of Turnover for Penalties) Order 2000, SI 2000/309 (amended by SI 2004/1259). As to the Secretary of State see PARA 5.

11 Competition Act 1998 s 36(9) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (28)(a)). As to the Consolidated Fund see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 711.

12 For these purposes 'specified date' means the date specified in the penalty notice: Competition Act 1998 s 37(2). 'Penalty notice' means a notice given under s 36 (see the text and notes 1-11): s 37(2).

13 Competition Act 1998 s 37(1) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (29)).

14 Competition Act 1998 s 38(1) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (30)). See OFT Guideline 423 *OFT's Guidance as to the Appropriate Amount of a Penalty* (December 2004). Part I of the Competition Act 1998 consists of ss 1-60. The guidance must include provision about the circumstances in which, in determining a penalty under Pt I, the OFT may take into account effects in another member state of the agreement or conduct concerned: s 38(1A) (added by SI 2004/1261). The OFT may, after consulting the Secretary of State, choose how it publishes its guidance: Competition Act 1998 s 38(5) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (30)).

15 Competition Act 1998 s 38(8) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (30)).

16 Competition Act 1998 s 38(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (30)).

17 Competition Act 1998 s 38(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (30)).

18 Competition Act 1998 s 38(4).

19 Competition Act 1998 s 38(6) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (30)).

20 As to the meaning of 'regulator' see PARA 147.

21 Competition Act 1998 s 38(7).

22 See PARA 166.

23 For these purposes, 'appropriate court' means, in relation to England and Wales, the Court of Appeal or the House of Lords: Competition Act 1998 s 38(10). As from 1 October 2009, the reference to the House of Lords is replaced with a reference to the Supreme Court: see s 38(10) (prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 65(1), (2)).

24 Competition Act 1998 s 38(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(5) ENFORCEMENT/138. Immunity from penalties for small agreements.

### **138. Immunity from penalties for small agreements.**

A party to a small agreement is immune from being required to pay a penalty<sup>1</sup> for infringing the Chapter I prohibition<sup>2</sup>. However, the Office of Fair Trading (the 'OFT')<sup>3</sup> may make a decision withdrawing that immunity<sup>4</sup> if, having investigated the agreement, and as a result of its investigation, it considers that the agreement is likely to infringe the Chapter I prohibition<sup>5</sup>. The OFT must give each of the parties in respect of which immunity is withdrawn written notice of its decision to withdraw the immunity<sup>6</sup>.

For these purposes, an agreement is a small agreement if it falls within a category prescribed for the purpose, but is not a price fixing agreement<sup>7</sup>. The criteria by reference to which a category of agreement is prescribed may, in particular, include: (1) the combined turnover of the parties to the agreement (determined in accordance with prescribed provisions); and (2) the share of the market affected by the agreement (determined in that way)<sup>8</sup>.

1       Ie under the Competition Act 1998 s 36(1) (see PARA 137), so far as that provision relates to decision about infringement of the Chapter I prohibition.

2       Competition Act 1998 s 39(3) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (31); and SI 2004/1261). As to the Chapter I prohibition see PARA 116.

3 As to the OFT see PARAS 6-8.

4 Competition Act 1998 s 39(3) (as amended: see note 2).

5 Competition Act 1998 s 39(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (31)). A decision under the Competition Act 1998 s 39(4) takes effect on such date (the 'withdrawal date') as may be specified in the decision: s 39(6). The withdrawal date must be a date after the date on which the decision is made: s 39(7). In determining the withdrawal date, the OFT must have regard to the amount of time which the parties are likely to require in order to secure that there is no further infringement of the Chapter I prohibition with respect to the agreement: s 39(8) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (31)).

As to the *de minimis* rule applied by the European Commission and the European Court of Justice in relation to agreements of minor importance see PARA 64. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see the Competition Act 1998 s 60; and PARA 150.

6 Competition Act 1998 s 39(5) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (31)).

7 Competition Act 1998 s 39(1). 'Price fixing agreement' means an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates: s 39(9).

8 Competition Act 1998 s 39(2). See the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000, SI 2000/262 (amended by SI 2000/2952; SI 2004/3379; SI 2006/3221; SI 2007/3253). As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(5) ENFORCEMENT/139. Immunity from penalties for conduct of minor significance.

### **139. Immunity from penalties for conduct of minor significance.**

A person<sup>1</sup> is immune from being required to pay a penalty<sup>2</sup> for infringing the Chapter II prohibition<sup>3</sup> if his conduct is conduct of minor significance<sup>4</sup>. However, the Office of Fair Trading (the 'OFT')<sup>5</sup> may make a decision withdrawing that immunity if, having investigated conduct of minor significance, and as a result of its investigation, it considers that the conduct is likely to infringe the Chapter II prohibition<sup>6</sup>. The OFT must give the person, or persons, whose immunity has been withdrawn written notice of its decision to withdraw the immunity<sup>7</sup>.

For these purposes, conduct is conduct of minor significance if it falls within a category prescribed for the purposes of these provisions<sup>8</sup>. The criteria by reference to which a category is prescribed may, in particular, include: (1) the turnover of the person whose conduct it is (determined in accordance with prescribed provisions); (2) the share of the market affected by the conduct (determined in that way)<sup>9</sup>.

1 As to the meaning of 'person' see PARA 118 note 8.

2 Ie under the Competition Act 1998 s 36(2) (see PARA 137) so far as that provision relates to decisions about infringement of the Chapter II prohibition.

3 As to the Chapter II prohibition see PARA 125.

4 Competition Act 1998 s 40(3) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (32)(a); and SI 2004/1261). See also PARA 138 note 5.

5 As to the OFT see PARAS 6-8.

6 Competition Act 1998 s 40(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (32)(b)). A decision under the Competition Act 1998 s 40(4) takes effect on such date (the 'withdrawal date') as may be specified in the decision: s 40(6). The withdrawal date must be a date after the date on which the decision is made: s 40(7). In determining the withdrawal date, the OFT must have regard to the amount of time which the person or persons affected are likely to require in order to secure that there is no further infringement of the Chapter II prohibition: s 40(8) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (32)(a)).

7 Competition Act 1998 s 40(5) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (32)(a)).

8 Competition Act 1998 s 40(1).

9 Competition Act 1998 s 40(2). See the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000, SI 2000/262 (amended by SI 2000/2952; SI 2004/3379; SI 2006/3221; SI 2007/3253). As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(6) OFFENCES/140. Offences relating to investigations.

## **(6) OFFENCES**

### **140. Offences relating to investigations.**

A person<sup>1</sup> is guilty of an offence if he fails to comply with a requirement imposed on him under provisions relating to the power of the Office of Fair Trading (the 'OFT')<sup>2</sup> to conduct investigations<sup>3</sup>. If a person is charged with such an offence in respect of a requirement to produce a document<sup>4</sup>, it is a defence for him to prove that the document was not in his possession or under his control, and that it was not reasonably practicable for him to comply with the requirement<sup>5</sup>. If a person is charged with an offence in respect of a requirement: (1) to provide information<sup>6</sup>; (2) to provide an explanation of a document; or (3) to state where a document is to be found, it is a defence for him to prove that he had a reasonable excuse for failing to comply with the requirement<sup>7</sup>.

A person is guilty of an offence if he intentionally obstructs an officer acting in the exercise of his power to enter business premises without a warrant<sup>8</sup>.

A person guilty of one of the offences described above is liable on summary conviction to a fine not exceeding the statutory maximum<sup>9</sup>, or on conviction on indictment to a fine<sup>10</sup>.

A person who intentionally obstructs an officer in the exercise of his powers under a warrant<sup>11</sup> is guilty of an offence and liable on summary conviction to a fine not exceeding the statutory maximum, or on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both<sup>12</sup>.

A person is guilty of an offence if, having been required to produce a document<sup>13</sup>: (a) he intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it; or (b) he causes or permits its destruction, disposal, falsification or concealment<sup>14</sup>. A person guilty of this offence is liable on summary conviction to a fine not exceeding the statutory maximum, or on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both<sup>15</sup>.

1 As to the meaning of 'person' see PARA 118 note 8. As to the commission of offences by bodies corporate see the Competition Act 1998 s 72; and PARA 164.

2 As to the OFT see PARAS 6-8.

3 Competition Act 1998 s 42(1) (amended by SI 2004/1261). The provisions referred to are the Competition Act 1998 s 26, 27, 28 or 28A (see PARAS 129-131). Failure to comply with a requirement imposed under s 26 or s 27 is not an offence if the person imposing the requirement has failed to act in accordance with that provision: s 42(4).

4 As to the meaning of 'document' see PARA 9 note 3.

5 Competition Act 1998 s 42(2).

6 As to the meaning of 'information' see PARA 9 note 3.

7 Competition Act 1998 s 42(3).

8 Competition Act 1998 s 42(5). The power referred to is conferred by s 27 (see PARA 130).

9 The 'statutory maximum', with reference to a fine or penalty on summary conviction for an offence, is the prescribed sum within the meaning of the Magistrates' Courts Act 1980 s 32: see the Interpretation Act 1978 s 5, Sch 1 (definition added by the Criminal Justice Act 1988 s 170(1), Sch 15 para 58); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 140. The 'prescribed sum' means £5,000 or such sum as is for the time being substituted in this definition by order under the Magistrates' Courts Act 1980 s 143(1): see s 32(9) (amended by the Criminal Justice Act 1991 s 17(2)); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 141.

10 Competition Act 1998 s 42(6).

11 Ie a warrant issued under the Competition Act 1998 s 28 or s 28A (see PARA 131).

12 Competition Act 1998 s 42(7) (amended by SI 2004/1261).

13 Ie required under the Competition Act 1998 s 26, s 27, s 28 or s 28A (see PARAS 129-131).

14 Competition Act 1998 s 43(1) (amended by SI 2004/1261).

15 Competition Act 1998 s 43(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(6) OFFENCES/141. False or misleading information.

### **141. False or misleading information.**

If information is provided by a person<sup>1</sup> to the Office of Fair Trading (the 'OFT')<sup>2</sup> in connection with any function of the OFT under Part I of the Competition Act 1998<sup>3</sup>, that person is guilty of an offence if: (1) the information is false or misleading in a material particular; and (2) he knows that it is or is reckless as to whether it is<sup>4</sup>. A person who (a) provides any information to another person, knowing the information to be false or misleading in a material particular; or (b) recklessly provides any information to another person which is false or misleading in a material particular, knowing that the information is to be used for the purpose of providing information to the OFT in connection with any of its functions under Part I of the Competition Act 1998, is guilty of an offence<sup>5</sup>.

1 As to the meaning of 'person' see PARA 118 note 8. As to the commission of offences by bodies corporate see the Competition Act 1998 s 72; and PARA 164.

2 As to the OFT see PARAS 6-8.

3 Ie the Competition Act 1998 ss 1-60.

4 Competition Act 1998 s 44(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (34)).



5 Competition Act 1998 s 44(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (34)). A person guilty of one of the offences described above is liable on summary conviction to a fine not exceeding the statutory maximum, and on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both: Competition Act 1998 s 44(3). As to the statutory maximum see PARA 140 note 9.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(7) LAND AGREEMENTS/142. Provision for the exclusion or exemption of vertical and land agreements.

## **(7) LAND AGREEMENTS**

### **142. Provision for the exclusion or exemption of vertical and land agreements.**

The Secretary of State<sup>1</sup> may by order provide for any provision of Part I of the Competition Act 1998<sup>2</sup> to apply in relation to: (1) vertical agreements<sup>3</sup>; or (2) land agreements<sup>4</sup>, with such modifications as may be prescribed<sup>5</sup>. An order may, in particular, provide for exclusions or exemptions, or otherwise provide for prescribed provisions not to apply, in relation to: (a) vertical agreements, or land agreements, in general; or (b) vertical agreements, or land agreements, of any prescribed description<sup>6</sup>. An order may empower the Office of Fair Trading (the 'OFT')<sup>7</sup> to give directions to the effect that in prescribed circumstances an exclusion, exemption or modification is not to apply (or is to apply in a particular way) in relation to an individual agreement<sup>8</sup>. Pursuant to this provision the Secretary of State has excluded certain land agreements from the Chapter I prohibition<sup>9</sup>.

1 As to the Secretary of State see PARA 5.

2 Ie the Competition Act 1998 ss 1-60.

3 'Vertical agreement' has such meaning as may be prescribed by an order: Competition Act 1998 s 50(5). At the date at which this volume states the law no such order had been made. All vertical agreements, apart from those imposing minimum or fixed resale prices, were excluded from the Chapter I prohibition until 30 April 2005 (see the Competition Act 1998 (Land and Vertical Agreements Exclusion) Order 2000, SI 2000/310 (revoked)).

4 'Land agreement' has such meaning as may be prescribed by an order: Competition Act 1998 s 50(5). See PARA 143.

5 Competition Act 1998 s 50(1). As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

For decisions of the European Commission and the European Court of Justice on the provisions of European Community law corresponding to those of the Competition Act 1998 see PARA 24 et seq. As to the duty to interpret the provisions of the Competition Act 1998 in a manner consistent with European Community law and the decisions of the European Court of Justice see s 60; and PARA 150.

6 Competition Act 1998 s 50(2). Section 50(2) is not to be read as limiting the powers conferred by s 71 (see PARA 163): s 50(4).

7 As to the OFT see PARAS 6-8.

8 Competition Act 1998 s 50(3) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (37)). The Competition Act 1998 s 50(3) is not to be read as limiting the powers conferred by s 71 (see PARA 163): s 50(4).

9 See the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260; and PARA 143. As to the Chapter I prohibition see PARA 116.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(7) LAND AGREEMENTS/143. Exclusion of land agreements.

### **143. Exclusion of land agreements.**

The Chapter I prohibition<sup>1</sup> does not apply to an agreement to the extent that it is a land agreement<sup>2</sup>, that is to say an agreement between undertakings which creates, alters, transfers or terminates an interest in land<sup>3</sup>, or an agreement to enter into such an agreement, together with certain obligations and restrictions<sup>4</sup>. Power is given to the Office of Fair Trading (the 'OFT')<sup>5</sup> to withdraw the benefit of the exclusion for land agreements<sup>6</sup>.

The OFT has published guidance on land agreements<sup>7</sup>.

1 As to the Chapter I prohibition see PARA 116.

2 Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260, art 4.

3 'Interest in land' includes any estate, interest, easement, servitude or right in or over land (including any interest or right created by a licence); and 'land' includes buildings and other structures and land covered with water: Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260, art 3.

4 See the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260, art 3. The obligations and restrictions referred to in the text are contained in art 5.

5 As to the OFT see PARAS 6-8.

6 See the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004, SI 2004/1260, art 6. The exclusion does not apply to a land agreement to the extent that it takes effect between the same parties and is to the like object or effect as an agreement in relation to which the exclusion has been withdrawn pursuant to art 6: see art 7.

7 See OFT Guideline 420 *Land Agreements* (December 2004).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(8) OFFICE OF FAIR TRADING'S RULES AND ADVICE; DEFAMATION/144. Rules.

## **(8) OFFICE OF FAIR TRADING'S RULES AND ADVICE; DEFAMATION**

### **144. Rules.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may make such rules about procedural and other matters in connection with the carrying into effect of the provisions of Part I of the Competition Act 1998<sup>2</sup> as it considers appropriate<sup>3</sup>. If the OFT is preparing rules it must consult such persons as it considers appropriate<sup>4</sup>. If the proposed rules relate to a matter in respect of which a regulator<sup>5</sup> exercises concurrent jurisdiction, those consulted must include that regulator<sup>6</sup>. No rule made by the OFT is to come into operation until it has been approved by an order made by the Secretary of State<sup>7</sup>. The Secretary of State may approve any rule made by the OFT: (1) in the form in which it is submitted; or (2) subject to such modifications as he considers appropriate<sup>8</sup>. If the Secretary of State proposes to approve a rule subject to modifications he must inform the OFT of the proposed modifications and take into account any comments made by the OFT<sup>9</sup>. The Secretary of State may, after consulting the OFT, by order vary or revoke any

rules made under these provisions<sup>10</sup>. If the Secretary of State considers that rules should be made with respect to a particular matter he may direct the OFT to exercise its powers and make rules about that matter<sup>11</sup>.

Pursuant to these powers the Secretary of State has approved the OFT's Rules<sup>12</sup>.

1 As to the OFT see PARAS 6-8.

2 In the Competition Act 1998 ss 1-60.

3 Competition Act 1998 s 51(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (38)(a)). In particular, provision can be made by such rules in relation to decisions (Competition Act 1998 Sch 9 para 5 (amended by the Enterprise Act 2002 Sch 25 para 38(1), (55); and SI 2004/1261)); block exemptions (Competition Act 1998 Sch 9 para 8 (substituted by SI 2004/1261)); parallel exemptions (Competition Act 1998 Sch 9 para 9 (amended by the Enterprise Act 2002 Sch 25 para 38(1), (55))); section 11 exemptions (see PARA 124) (Competition Act 1998 Sch 9 para 10); directions withdrawing exclusions (Sch 9 para 11 (amended by the Enterprise Act 2002 Sch 25 para 38(1), (55); and SI 2004/1261)); disclosure of information (Competition Act 1998 Sch 9 para 12 (amended by the Enterprise Act 2002 Sch 25 para 38(1), (55))); applications under the Competition Act 1998 s 47 (see PARA 167) (Sch 9 para 13 (amended by the Enterprise Act 2002 Sch 25 para 38(1), (55))); and enforcement (Competition Act 1998 Sch 9 para 14 (amended by the Enterprise Act 2002 Sch 25 para 38(1), (55); and SI 2004/1261)). The OFT's powers under the Competition Act 1998 s 51 may not be taken to be restricted by Sch 9: s 51(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(b)).

4 Competition Act 1998 s 51(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(c)).

5 As to the meaning of 'regulator' see PARA 147.

6 Competition Act 1998 s 51(4).

7 Competition Act 1998 s 51(5) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(d)). The Competition Act 1998 s 51(5)-(7) applies also to any alteration of the rules made by the OFT: s 51(8) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(d)). As to the Secretary of State see PARA 5. As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

8 Competition Act 1998 s 51(6) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(d)). See also note 7.

9 Competition Act 1998 s 51(7) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(d)). See also note 7.

10 Competition Act 1998 s 51(9) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(d)).

11 Competition Act 1998 s 51(10) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (38)(e)).

12 See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(8) OFFICE OF FAIR TRADING'S RULES AND ADVICE; DEFAMATION/145. Advice and information.

## **145. Advice and information.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> has published general advice and information<sup>2</sup> about: (1) the application of the Chapter I prohibition<sup>3</sup> and the Chapter II prohibition<sup>4</sup>, and the enforcement of those prohibitions<sup>5</sup>; and (2) the application of the prohibitions on restriction or distortion of competition and abuse of a dominant position in the EC Treaty<sup>6</sup>, and the enforcement by it of those prohibitions<sup>7</sup>. The OFT may at any time publish revised, or new, advice or information<sup>8</sup>. Advice and information published under these provisions must be prepared with a view to: (a) explaining provisions of Part I of the Competition Act 1998<sup>9</sup> to persons who are likely to be

affected by them; and (b) indicating how the OFT expects such provisions to operate<sup>10</sup>. Any advice or information published by the OFT is to be published in such form and in such manner as it considers appropriate<sup>11</sup>. If the OFT is preparing any advice or information it must consult such persons as it considers appropriate<sup>12</sup>. If the proposed advice or information relates to a matter in respect of which a regulator<sup>13</sup> exercises concurrent jurisdiction, those consulted must include that regulator<sup>14</sup>. In preparing any advice or information about a matter in respect of which he may exercise functions under Part I of the Competition Act 1998, a regulator must consult: (i) the OFT; (ii) the other regulators; and (iii) such other persons as he considers appropriate<sup>15</sup>.

1 As to the OFT see PARAS 6-8.

2 Pursuant to the Competition Act 1998 s 52(1); the Guidelines published under this provision can be accessed on the OFT's website <http://www.oft.gov.uk>.

3 As to the Chapter I prohibition see PARA 116.

4 As to the Chapter II prohibition see PARA 125.

5 The requirement to publish such advice and information is imposed by the Competition Act 1998 s 52(1).

6 Ie the EC Treaty art 81 (see PARA 61 et seq) and art 82 (see PARA 68 et seq). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

7 Competition Act 1998 s 52(1A) (added by SI 2004/1261).

8 Competition Act 1998 s 52(2) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (39)(a)).

9 Ie the Competition Act 1998 ss 1-60.

10 Competition Act 1998 s 52(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (39)(a)). Advice (or information) published by virtue of head (b) in the text may include advice (or information) about the factors which the OFT may take into account in considering whether, and if so how, to exercise a power conferred on it by the Competition Act 1998 Ch I (ss 1-11), Ch II (ss 17-19) or Ch III (ss 25-44): s 52(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (39)(b)).

11 Competition Act 1998 s 52(5) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (39)(c)).

12 Competition Act 1998 s 52(6) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (39)(d)).

13 As to the meaning of 'regulator' see PARA 147.

14 Competition Act 1998 s 52(7).

15 Competition Act 1998 s 52(8) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (39)(e)).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(8) OFFICE OF FAIR TRADING'S RULES AND ADVICE; DEFAMATION/146. Defamation.

## **146. Defamation.**

For the purposes of the law relating to defamation, absolute privilege attaches to any advice, guidance, notice or direction given, or decision made, by the Office of Fair Trading (the 'OFT')<sup>1</sup> in the exercise of any of its functions under Part I of the Competition Act 1998<sup>2</sup>.

1 As to the OFT see PARAS 6-8.

2 Competition Act 1998 s 57 (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), 42). Part I of the Act consists of ss 1-60. As to defamation generally see **LIBEL AND SLANDER**.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(9) SECTORAL REGULATORS/147. Concurrent powers of the sectoral regulators.

## **(9) SECTORAL REGULATORS**

### **147. Concurrent powers of the sectoral regulators.**

In Part I of the Competition Act 1998<sup>1</sup> 'regulator' means:

- (1) the Office of Communications<sup>2</sup>;
- (2) the Gas and Electricity Markets Authority<sup>3</sup>;
- (3) the Director General of Electricity Supply for Northern Ireland<sup>4</sup>;
- (4) the Water Services Regulation Authority<sup>5</sup>;
- (5) the Office of Rail Regulation<sup>6</sup>;
- (6) the Director General of Gas for Northern Ireland<sup>7</sup>;
- (7) the Civil Aviation Authority<sup>8</sup>.

Functions of the Office of Fair Trading (the 'OFT')<sup>9</sup> under Part I of the Competition Act 1998 are exercisable concurrently by the regulators<sup>10</sup>. The Secretary of State<sup>11</sup> may make regulations<sup>12</sup> for the purpose of co-ordinating the performance of functions under Part I of the Competition Act 1998 ('Part I functions') which are exercisable concurrently by two or more competent persons<sup>13</sup> as a result of any enactment, including any subordinate legislation, whenever passed or made<sup>14</sup>. The regulations may, in particular, make provision:

- (a) as to the procedure to be followed by competent persons when determining who is to exercise Part I functions in a particular case<sup>15</sup>;
- (b) as to the steps which must be taken before a competent person exercises, in a particular case, such Part I functions as may be prescribed<sup>16</sup>;
- (c) as to the procedure for determining, in a particular case, questions arising as to which competent person is to exercise Part I functions in respect of the case<sup>17</sup>;
- (d) for Part I functions in a particular case to be exercised jointly (i) by the OFT and one or more regulators; or (ii) by two or more regulators, and as to the procedure to be followed in such cases<sup>18</sup>;
- (e) as to the circumstances in which the exercise by a competent person of such Part I functions as may be prescribed is to preclude the exercise of such functions by another such person<sup>19</sup>;
- (f) for cases in respect of which Part I functions are being, or have been, exercised by a competent person to be transferred to another such person<sup>20</sup>;
- (g) for the person exercising Part I functions in a particular case (i) to appoint another competent person to exercise Part I functions on his behalf in relation to the case; or (ii) to appoint officers of that other person (with the latter's consent) to act as officers of the first named person in relation to the case<sup>21</sup>;
- (h) for notification as to who is exercising Part I functions in respect of a particular case<sup>22</sup>.

Guidance has been published on the concurrent powers of the OFT and the regulators<sup>23</sup>.

1      le the Competition Act 1998 ss 1-60.

2      Competition Act 1998 s 54(1)(a) (substituted by the Communications Act 2003 s 371(5)(a)). See PARA 19.

3      Competition Act 1998 s 54(1)(b) (substituted by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (41)(a)). See PARA 20.

4      Competition Act 1998 s 54(1)(c) (substituted by the Enterprise Act 2002 Sch 25 para 38(1), (41)(a)).

5      Competition Act 1998 s 54(1)(d) (substituted by the Water Act 2003 s 101(1), Sch 7 para 32(1), (2)). See PARA 21.

6      Competition Act 1998 s 54(1)(e) (substituted by the Railways and Transport Safety Act 2003 s 16(5), Sch 2 para 19(p)). See PARA 22.

7      Competition Act 1998 s 54(1)(f) (substituted by the Enterprise Act 2002 Sch 25 para 38(1), (41)(a)).

8      Competition Act 1998 s 54(1)(g) (substituted by the Enterprise Act 2002 Sch 25 para 38(1), (41)(a)). See PARA 342 note 20.

9      As to the OFT see PARAS 6-8.

10     See the Competition Act 1998 s 54(2), Sch 10 Pt II (s 54(2) amended by the Enterprise Act 2002 Sch 25 para 38(1), (41)(b); the Competition Act 1998 Sch 10 Pt II amended by the Utilities Act 2000 s 108, Sch 8, the Enterprise Act 2002 Sch 26, the Communications Act 2003 s 406(7), Sch 19(1), the Water Act 2003 s 101, Sch 7 para 32(1), (4)(a) and the Railways and Transport Safety Act 2003 s 16(4), (5), Sch 3 para 4), which makes amendments to a number of other enactments in order to give effect to such concurrency. Minor and consequential amendments in connection with the regulators' competition functions are also made: see the Competition Act 1998 s 54(3), Sch 10 Pt IV (amended by the Transport Act 2000 s 274, Sch 31 Pt IV, the Enterprise Act 2002 Sch 26, the Communications Act 2003 Sch 19(1), the Water Act 2003 Sch 7 para 32(1), (4)(b), Sch 9 Pt 3 and SI 2003/1398).

11     As to the Secretary of State see PARA 5.

12     For the regulations made in pursuance of this power see the Competition Act 1998 (Concurrency) Regulations 2004, SI 2004/1077. As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

13     'Competent person' means the OFT or any of the regulators: Competition Act 1998 s 54(7) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (41)(b)).

14     Competition Act 1998 s 54(4) (amended by SI 2004/1261). 'Subordinate legislation' has the same meaning as in the Interpretation Act 1978 s 21(1) (see **STATUTES** vol 44(1) (Reissue) PARA 1381) and includes an instrument made under an Act of the Scottish Parliament and Northern Ireland legislation: Competition Act 1998 s 54(8) (added by SI 2004/1261).

15     Competition Act 1998 s 54(5)(a).

16     Competition Act 1998 s 54(5)(b).

17     Competition Act 1998 s 54(5)(c). Provision made under this head may provide for questions to be referred to and determined by the Secretary of State or by such other person as may be prescribed: s 54(6).

18     Competition Act 1998 s 54(5)(d) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (41)(b)).

19     Competition Act 1998 s 54(5)(e).

20     Competition Act 1998 s 54(5)(f).

21     Competition Act 1998 s 54(5)(g).

22     Competition Act 1998 s 54(5)(h).

23 See OFT Guideline 405 *Concurrent Application to Regulated Industries* (December 2004).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(10) FINDINGS OF FACT AND INFRINGEMENT/148. Office of Fair Trading's findings bind the parties.

## **(10) FINDINGS OF FACT AND INFRINGEMENT**

### **148. Office of Fair Trading's findings bind the parties.**

Unless the court<sup>1</sup> directs otherwise, a finding of fact made by the Office of Fair Trading (the 'OFT')<sup>2</sup> in the course of conducting an investigation<sup>3</sup> which is relevant to an issue arising in Part I proceedings<sup>4</sup> is binding on the parties if: (1) the time for bringing an appeal<sup>5</sup> in respect of the finding has expired and the relevant party<sup>6</sup> has not brought such an appeal; or (2) the decision of the Competition Appeal Tribunal<sup>7</sup> on such an appeal has confirmed the finding<sup>8</sup>. Rules of court may make provision in respect of assistance to be given by the OFT to the court in Part I proceedings<sup>9</sup>.

1 As to the meaning of 'court' see PARA 131 note 2.

2 As to the OFT see PARAS 6-8.

3 As to investigations see PARA 129.

4 'Part I proceedings' means proceedings brought otherwise than by the OFT: (1) in respect of an alleged infringement of the Chapter I prohibition or of the Chapter II prohibition; or (2) in respect of an alleged infringement of the prohibitions in the EC Treaty art 81(1) (see PARA 61 et seq) or art 82 (see PARA 68 et seq): Competition Act 1998 s 58(2) (definition substituted by SI 2004/1261). As to the Chapter I prohibition see PARA 116. As to the Chapter II prohibition see PARA 125. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

5 Ie under the Competition Act 1998 s 46 or s 47 (see PARAS 166-167).

6 'Relevant party' means: (1) in relation to the Chapter I prohibition or the prohibition in the EC Treaty art 81(1), a party to the agreement which is alleged to have infringed the prohibition; and (2) in relation to the Chapter II prohibition or the prohibition in the EC Treaty art 82, the undertaking whose conduct is alleged to have infringed the prohibition: Competition Act 1998 s 58(2) (definition amended by SI 2004/1261).

7 As to the Competition Appeal Tribunal see PARAS 13-17.

8 Competition Act 1998 s 58(1), (2) (s 58(1) amended by the Enterprise Act 2002 ss 21, 278(1), Sch 5 paras 1, 5(a), (b), Sch 25 para 38(1), (43)(a), (b) and by SI 2004/1261; the Competition Act 1998 s 58(2) amended by SI 2004/1261).

9 Competition Act 1998 s 58(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (43)(a)).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(10) FINDINGS OF FACT AND INFRINGEMENT/149. Findings of infringements.

### **149. Findings of infringements.**

Where there are proceedings before the court<sup>1</sup> in which damages or any other sum of money is claimed in respect of an infringement of the Chapter I prohibition<sup>2</sup>, the Chapter II prohibition<sup>3</sup>, the prohibition on restriction or distortion of competition in the EC Treaty<sup>4</sup> or the prohibition on abuse of a dominant position in the EC Treaty<sup>5</sup> then, in such proceedings, the court is bound by the decisions of the Office of Fair Trading (the 'OFT')<sup>6</sup> or the Competition Appeal Tribunal<sup>7</sup> that there has been an infringement<sup>8</sup>, once any period available for further appeal has elapsed<sup>9</sup>.

1 As to the meaning of 'court' see PARA 131 note 2.

2 As to the Chapter I prohibition see PARA 116.

3 As to the Chapter II prohibition see PARA 125.

4 Ie the EC Treaty art 81 (see PARA 61 et seq). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

5 Ie the EC Treaty art 82 (see PARA 68 et seq).

6 As to the OFT see PARAS 6-8.

7 As to the Competition Appeal Tribunal see PARAS 13-17.

8 See the Competition Act 1998 s 58A(3) (added by the Enterprise Act 2002 s 20(1)).

9 Competition Act 1998 s 58A(1), (2) (added by the Enterprise Act 2002 s 20(1)). The periods available are: (1) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under the Competition Act 1998 s 46 or s 47 (see PARAS 166-167); (2) in the case of a decision of the Tribunal, the period during which a further appeal may be made under s 49 (see PARA 170); (3) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal; and, where any appeal mentioned in head (1), (2) or (3) is made, the period specified includes the period before the appeal is determined: s 58A(4) (added by the Enterprise Act 2002 s 20(1); and amended by SI 2007/1846). As from 1 October 2009, the Competition Act 1998 s 58A(4) is amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 para 65(1), (4) to replace the reference to the House of Lords with a reference to the Supreme Court.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(11) PRINCIPLES TO BE APPLIED IN DETERMINING QUESTIONS/150. Consistency with European Community law.

## **(11) PRINCIPLES TO BE APPLIED IN DETERMINING QUESTIONS**

### **150. Consistency with European Community law.**

Provision is made to ensure that so far as is possible (having regard to any relevant differences between the provisions concerned), questions arising under Part I of the Competition Act 1998<sup>1</sup> in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community<sup>2</sup>. At any time when the court<sup>3</sup> determines a question arising under Part I of the Competition Act 1998, it must act (so far as is compatible with the provisions of Part I and whether or not it would otherwise be required to do so) with a view to securing that there is no inconsistency between: (1) the principles applied, and decision reached, by the court in determining that question; and (2) the principles laid down by the EC Treaty<sup>4</sup> and the European Court<sup>5</sup>, and any relevant decision<sup>6</sup> of that Court, as applicable at that time in determining any corresponding question arising in Community law<sup>7</sup>. The court must, in addition, have regard to any relevant decision or statement of the European Commission<sup>8</sup>.



The provisions described above also apply to the Office of Fair Trading (the 'OFT')<sup>9</sup>, and to any person acting on behalf of the OFT, in connection with any matter arising under Part I of the Competition Act 1998<sup>10</sup>.

1       Ie the Competition Act 1998 ss 1-60.

2       Competition Act 1998 s 60(1).

3       In the Competition Act 1998 s 60(2), (3), 'court' means any court or tribunal: s 60(5).

4       As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1.

5       'European Court' means the Court of Justice of the European Communities and includes the Court of First Instance: Competition Act 1998 s 59(1).

6       In head (2) in the text and the Competition Act 1998 s 60(3) (see the text and note 8), 'decision' includes a decision as to: (1) the interpretation of any provision of Community law; (2) the civil liability of an undertaking for harm caused by its infringement of Community law: s 60(6).

7       Competition Act 1998 s 60(2).

8       Competition Act 1998 s 60(3). As to the meanings of 'court' and 'decision' for these purposes see notes 3, 6.

9       As to the OFT see PARAS 6-8.

10      Competition Act 1998 s 60(4) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (45)).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(i) Inspections on behalf of the European Commission/151. Power to enter business premises: European Commission inspections.

## **(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE**

### **(i) Inspections on behalf of the European Commission**

#### **151. Power to enter business premises: European Commission inspections.**

A judge of the High Court must issue a warrant if satisfied, on an application made to the High Court in accordance with rules of court by the Office of Fair Trading (the 'OFT')<sup>1</sup>, that the European Commission has ordered an inspection of business premises<sup>2</sup>, that inspection is being, or is likely to be, obstructed and the measures that would be authorised by the warrant are neither arbitrary nor excessive having regard to the subject matter of the inspection<sup>3</sup>.

A European Commission investigation is being obstructed if: (1) a Commission official<sup>4</sup>, exercising his power in accordance with the provision under which the investigation is being conducted<sup>5</sup>, has attempted to enter any business premises<sup>6</sup> but has been unable to do so<sup>7</sup>; and (2) there are reasonable grounds for suspecting that there are on any business premises books or records<sup>8</sup> which the Commission official has power to examine<sup>9</sup>. A Commission investigation is also being obstructed if there are reasonable grounds for suspecting that there are on any business premises books or records the production of which has been required by a Commission official exercising his power in accordance with the provision under which the

investigation is being conducted<sup>10</sup> and which have not been produced as required<sup>11</sup>. A Commission investigation is likely to be obstructed if: (a) there are reasonable grounds for suspecting that there are on any business premises books or records which a Commission official has power to examine; and (b) there are also reasonable grounds for suspecting that, if the Commission official attempted to exercise his power to examine any of the books or records, they would not be produced but would be concealed, removed, tampered with or destroyed<sup>12</sup>.

A warrant<sup>13</sup> issued under the provisions described above authorises a named officer of the OFT and any other OFT officer<sup>14</sup>, or Commission official, accompanying the named officer: (i) to enter any business premises specified in the warrant using such force as is reasonably necessary for the purpose; (ii) to search for books and records which a Commission official has power to examine, using such force as is reasonably necessary for the purpose; (iii) to take or obtain copies of or extracts from such books and records; and (iv) to seal the premises, any part of the premises or any books or records which a Commission official has power to seal, for the period and to the extent necessary for the inspection<sup>15</sup>. Any person entering any premises by virtue of a warrant may take with him such equipment as appears to him to be necessary<sup>16</sup>. If there is no one at the premises when the officer named in the warrant proposes to execute it he must, before executing it, take such steps as are reasonable in all the circumstances to inform the occupier<sup>17</sup> of the intended entry, and if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed<sup>18</sup>. On leaving any premises entered by virtue of the warrant the named officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them<sup>19</sup>. A warrant continues in force until the end of the period of one month beginning with the day on which it is issued<sup>20</sup>.

1 As to the OFT see PARAS 6-8.

2 I.e. an inspection under EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 20 (an 'Article 20 inspection'). See PARA 92. As to the EC Treaty (ie the Treaty establishing the European Economic Community, Rome, 25th March 1957) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. As to investigations by the European Commission see PARA 82 et seq.

3 Competition Act 1998 s 62(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (47)(a); and SI 2004/1261).

4 'Commission official' means any of the persons authorised by the Commission to conduct the Article 20 inspection: Competition Act 1998 s 62(10) (added by SI 2004/1261).

5 I.e. in accordance with EC Competition Regulation art 20(3).

6 'Business premises' means any premises of an undertaking or association of undertakings which a Commission official has under Article 20 of the EC Competition Regulation power to enter in the course of the Article 20 inspection: Competition Act 1998 s 62(10) (added by SI 2004/1261). The reference in the definition of 'business premises' to Article 20 of the EC Competition Regulation does not include a reference to that Article as applied by Article 21 of that Regulation: Competition Act 1998 s 62(11) (added by SI 2004/1261). 'Premises' includes any land or any means of transport: Competition Act 1998 s 61 (substituted by SI 2004/1261).

7 Competition Act 1998 s 62(2)(a) (amended by SI 2004/1261).

8 'Books and records' includes books and records stored on any medium: Competition Act 1998 s 61 (substituted by SI 2004/1261).

9 Competition Act 1998 s 62(2)(b) (amended by SI 2004/1261).

10 I.e. under EC Competition Regulation art 20(3).

11 Competition Act 1998 s 62(3) (amended by SI 2004/1261).

12 Competition Act 1998 s 62(4) (amended by SI 2004/1261).

13 Ie a warrant issued under the Competition Act 1998 s 62. A warrant must indicate the subject matter and purpose of the inspection, and the nature of the offence created by s 65 (see PARA 154): s 64(1) (amended by SI 2004/1261).

14 'OFT officer' means any officer of the OFT whom the OFT has authorised in writing to accompany the named officer: Competition Act 1998 s 62(10) (added by SI 2004/1261).

15 Competition Act 1998 s 62(5) (substituted by SI 2004/1261). The powers conferred by s 62 are to be exercised on production of a warrant issued under that provision: Competition Act 1998 s 64(2). A warrant may authorise persons specified in the warrant to accompany the named officer who is executing it: s 62(5A) (added by the Enterprise Act 2002 s 203(1), (3)).

16 Competition Act 1998 s 62(6).

17 'Occupier', in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises: Competition Act 1998 s 64(5).

18 Competition Act 1998 s 64(3), (5) (amended by SI 2004/1261). If the named officer is unable to inform the occupier of the intended entry he must, when executing the warrant, leave a copy of it in a prominent place on the premises: Competition Act 1998 s 64(4).

19 Competition Act 1998 s 62(7).

20 Competition Act 1998 s 62(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(i) Inspections on behalf of the European Commission/152. Power to enter non-business premises: European Commission inspections.

## **152. Power to enter non-business premises: European Commission inspections.**

A judge of the High Court must issue a warrant if satisfied, on an application made to the High Court in accordance with the rules of court by the Office of Fair Trading (the 'OFT')<sup>1</sup>, that the European Commission has ordered an inspection of non-business premises<sup>2</sup>, and the measures that would be authorised by the warrant are neither arbitrary nor excessive having regard in particular to the following matters<sup>3</sup>: (1) the seriousness of the suspected infringement of the prohibition on restriction or distortion of competition in the EC Treaty<sup>4</sup> or the prohibition on abuse of a dominant position in the EC Treaty<sup>5</sup>; (2) the importance of the evidence sought; (3) the involvement of the undertaking or association of undertakings concerned; and (4) whether it is reasonably likely that business books and records<sup>6</sup> relating to the subject matter of the inspection are kept on the non-business premises that would be specified in the warrant<sup>7</sup>.

A warrant under the above provisions authorises a named officer of the OFT and any other OFT officer<sup>8</sup>, or Commission official<sup>9</sup>, accompanying the named officer to enter any non-business premises specified in the warrant<sup>10</sup>. A warrant may authorise a named officer of the OFT and any other OFT officer, or Commission official, accompanying the named officer to search for books or records which a Commission official has power to examine<sup>11</sup>. A warrant may authorise a named officer of the OFT and any other OFT officer, or Commission official, accompanying the named officer to take or obtain copies of books or records of which a Commission official has power to take or obtain copies<sup>12</sup>. A warrant may authorise persons specified in the warrant to accompany the named officer who is executing it<sup>13</sup>. Any person entering any premises by virtue of a warrant may take with him such equipment as appears to him to be necessary<sup>14</sup>.

If there is no one at the premises when the officer named in the warrant proposes to execute it he must, before executing it, take such steps as are reasonable in all the circumstances to inform the occupier<sup>15</sup> of the intended entry, and if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed<sup>16</sup>. On leaving any premises entered by virtue of a warrant the named officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them<sup>17</sup>. A warrant continues in force until the end of the period of one month beginning with the day on which it is issued<sup>18</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie an inspection under EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 21 (an 'Article 21 inspection'). See PARA 92. As to the EC Treaty (ie the Treaty establishing the European Economic Community, Rome, 25th March 1957) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. As to investigations by the European Commission see PARA 82 et seq. 'Non-business premises' means any premises to which a decision of the European Commission ordering the Article 21 inspection relates: Competition Act 1998 s 62A(12) (added by SI 2004/1261). As to the meaning of 'premises' see PARA 151 note 6.

3 Competition Act 1998 s 62A(1) (added by SI 2004/1261).

4 Ie the EC Treaty art 81 (see PARA 61 et seq).

5 Ie the EC Treaty art 82 (see PARA 68 et seq).

6 As to the meaning of 'books and records' see PARA 151 note 8.

7 Competition Act 1998 s 62A(2) (added by SI 2004/1261).

8 'OFT officer' means any officer of the OFT whom the OFT has authorised in writing to accompany the named officer: Competition Act 1998 s 62A(12) (added by SI 2004/1261).

9 'Commission official' means any of the persons authorised by the European Commission to conduct the Article 21 inspection: Competition Act 1998 s 62A(12) (added by SI 2004/1261).

10 Competition Act 1998 s 62A(3) (added by SI 2004/1261). A warrant may authorise the use, for either or both of the purposes mentioned in the Competition Act 1998 s 62A(3) and (4), of such force as is reasonably necessary: s 62A(6) (added by SI 2004/1261). A warrant must indicate the subject matter and purpose of the inspection, and the nature of the offence created by the Competition Act 1998 s 65 (see PARA 154): s 64(1) (amended by SI 2004/1261). The powers conferred by the Competition Act 1998 s 62A are to be exercised on production of a warrant issued under that provision: s 64(2) (amended by SI 2004/1261).

11 Competition Act 1998 s 62A(4) (added by SI 2004/1261). See note 10.

12 Competition Act 1998 s 62A(5) (added by SI 2004/1261).

13 Competition Act 1998 s 62A(7) (added by SI 2004/1261).

14 Competition Act 1998 s 62A(8) (added by SI 2004/1261).

15 'Occupier', in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises: Competition Act 1998 s 64(5).

16 Competition Act 1998 s 64(3), (5) (amended by SI 2004/1261). If the named officer is unable to inform the occupier of the intended entry he must, when executing the warrant, leave a copy of it in a prominent place on the premises: Competition Act 1998 s 64(4).

17 Competition Act 1998 s 62A(9) (added by SI 2004/1261).

18 Competition Act 1998 s 62A(10) (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(i) Inspections on behalf of the European Commission/153. Power to enter premises: Office of Fair Trading's inspection at the request of the European Commission.

**153. Power to enter premises: Office of Fair Trading's inspection at the request of the European Commission.**

A judge of the High Court must issue a warrant if satisfied, on an application made to the High Court in accordance with rules of court by the Office of Fair Trading (the 'OFT')<sup>1</sup>, that: (1) the European Commission has requested the OFT to conduct an inspection<sup>2</sup> which the Commission has ordered<sup>3</sup>; (2) the inspection is being, or is likely to be, obstructed; and (3) the measures that would be authorised by the warrant are neither arbitrary nor excessive having regard to the subject matter of the inspection<sup>4</sup>.

An inspection is being obstructed if: (a) an authorised officer<sup>5</sup> of the OFT has attempted to enter any business premises<sup>6</sup> but has been unable to do so; (b) the officer has produced his authorisation to the undertaking, or association of undertakings, concerned; and (c) there are reasonable grounds for suspecting that there are on any business premises books or records<sup>7</sup> which the officer has power to examine<sup>8</sup>. An inspection is also being obstructed if: (i) there are reasonable grounds for suspecting that there are on business premises books or records which an authorised officer of the OFT has power to examine; (ii) the officer has produced his authorisation to the undertaking, or association of undertakings, and has required production of the books or records; and (iii) the books and records have not been produced as required<sup>9</sup>. An inspection is likely to be obstructed if there are reasonable grounds for suspecting that there are on any business premises books or records which an authorised officer of the OFT has power to examine, and there are also reasonable grounds for suspecting that, if the officer attempted to exercise his power to examine any of the books or records, they would not be produced but would be concealed, removed, tampered with or destroyed<sup>10</sup>.

A warrant under the above provisions authorises a named authorised officer of the OFT, any other authorised officer of the OFT, or Commission official<sup>11</sup>, accompanying the named authorised officer<sup>12</sup>: (A) to enter any business premises specified in the warrant using such force as is reasonably necessary for the purpose; (B) to search for books and records which an authorised officer of the OFT has power to examine, using such force as is reasonably necessary for the purpose; (C) to take or obtain copies of or extracts from such books and records; and (D) to seal the premises, any part of the premises or any books or records with any authorised officer of the OFT has power to seal, for the period and to the extent necessary for the inspection<sup>13</sup>. Any person entering any premises by virtue of a warrant may take with him such equipment as appears to him to be necessary<sup>14</sup>. If there is no one at the premises when the officer named in the warrant proposes to execute it he must, before executing it, take such steps as are reasonable in all the circumstances to inform the occupier<sup>15</sup> of the intended entry, and if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed<sup>16</sup>. On leaving any premises which he has entered by virtue of the warrant the named authorised officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them<sup>17</sup>. A warrant continues in force until the end of the period of one month beginning with the day on which it is issued<sup>18</sup>.

1 As to the OFT see PARAS 6-8.

2 I.e. an inspection under EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 22(2) (an

'Article 22(2) inspection'). See PARA 92. As to the EC Treaty (ie the Treaty establishing the European Economic Community, Rome, 25th March 1957) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. As to investigations by the European Commission see PARA 82 et seq.

3       Ie by a decision under the EC Competition Regulation art 20(4).

4       Competition Act 1998 s 63(1) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (48)(a); and SI 2004/1261).

5       'Authorised officer of the OFT' means any officer of the OFT to whom an authorisation has been given: Competition Act 1998 s 62B(2) (added by SI 2004/1261). 'Authorisation' means an authorisation given in writing by the OFT which: (1) identifies the officer; (2) indicates the subject matter and purpose of the investigation; and (3) draws attention to any penalties which a person may incur under the EC Competition Regulation in connection with the inspection: Competition Act 1998 s 62B(2) (added by SI 2004/1261). For the purposes of an Article 22(2) inspection, an authorised officer of the OFT has the powers specified in EC Competition Regulation art 20(2): Competition Act 1998 s 62B(1) (added by SI 2004/1261).

6       'Business premises' means any premises of an undertaking or association of undertakings which an authorised officer of the OFT has power to enter in the course of the Article 22(2) inspection: Competition Act 1998 s 63(10) (added by SI 2004/1261). As to the meaning of 'premises' see PARA 151 note 6.

7       As to the meaning of 'books and records' see PARA 151 note 8.

8       Competition Act 1998 s 63(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (48)(b); and SI 2004/1261).

9       Competition Act 1998 s 63(3) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (48)(b); and SI 2004/1261).

10       Competition Act 1998 s 63(4) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (48)(b); and SI 2004/1261).

11       'Commission official' means any person authorised by the European Commission to assist with the Article 22(2) inspection: Competition Act 1998 s 63(10) (added by SI 2004/1261).

12       A warrant under the Competition Act 1998 s 63 may authorise persons specified in the warrant to accompany the named authorised officer who is executing it: s 63(5A) (added by the Enterprise Act 2002 s 203(1), (4)).

13       Competition Act 1998 s 63(5) (substituted by SI 2004/1261). A warrant must indicate the subject matter and purpose of the investigation, and the nature of the offence created by s 65 (see PARA 154): s 64(1). The powers conferred by s 63 are to be exercised on production of a warrant issued under that provision: s 64(2).

14       Competition Act 1998 s 63(6).

15       'Occupier', in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises: Competition Act 1998 s 64(5).

16       Competition Act 1998 s 64(3), (5). If the named officer is unable to inform the occupier of the intended entry he must, when executing the warrant, leave a copy of it in a prominent place on the premises: s 64(4).

17       Competition Act 1998 s 63(7) (amended by SI 2004/1261).

18       Competition Act 1998 s 63(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(i) Inspections on behalf of the European Commission/154. Offences.

## 154. Offences.

A person is guilty of an offence if he intentionally obstructs any person in the exercise of his powers under a warrant issued for the purposes of a European Commission inspection or an inspection by the Office of Fair Trading at the request of the Commission<sup>1</sup>. A person guilty of such an offence is liable on summary conviction to a fine not exceeding the statutory maximum<sup>2</sup>, or on conviction on indictment to imprisonment for a term not exceeding two years or to a fine or to both<sup>3</sup>.

1 Competition Act 1998 s 65(1) (amended by SI 2004/1261). Such warrants are issued under the Competition Act 1998 s 62 (Commission inspections of business premises) (see PARA 151), s 62A (Commission inspections of non-business premises) (see PARA 152) or s 63 (OFT's inspections of business premises) (see PARA 153). As to offences by bodies corporate see s 72; and PARA 164. As to the Office of Fair Trading see PARAS 6-8.

2 As to the statutory maximum see PARA 140 note 9.

3 Competition Act 1998 s 65(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(i) Inspections on behalf of the European Commission/155. Privileged communications and use of statements in prosecution.

### **155. Privileged communications and use of statements in prosecution.**

A person may not be required, in connection with an inspection by the Office of Fair Trading<sup>1</sup> at the request of the European Commission<sup>2</sup>, to produce or disclose a privileged communication<sup>3</sup>. A privileged communication is: (1) a communication between a professional legal adviser and his client; or (2) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings, which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege<sup>4</sup>.

A statement made by a person in connection with such an inspection<sup>5</sup> may not be used in evidence against him on a prosecution for a cartel offence<sup>6</sup> unless, in the proceedings: (a) in giving evidence, he makes a statement inconsistent with it; and (b) evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf<sup>7</sup>.

1 As to the Office of Fair Trading see PARAS 6-8.

2 Ie by virtue of any provision of the Competition Act 1998 s 62B or s 63 (see PARA 153).

3 Competition Act 1998 s 65A(1) (added by SI 2004/1261).

4 Competition Act 1998 s 65A(2) (added by SI 2004/1261). As to legal professional privilege see **LEGAL PROFESSIONS** vol 65 (2008) PARA 719; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146.

5 Ie in response to a requirement imposed by virtue of the Competition Act 1998 s 62B or s 63 (see PARA 153).

6 Ie an offence under the Enterprise Act 2002 s 188 (see PARA 319).

7 Competition Act 1998 s 65B (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(ii) Investigations by the Office of Fair Trading on behalf of the Competition Authority of another Member State/156. Power to conduct an investigation.

## **(ii) Investigations by the Office of Fair Trading on behalf of the Competition Authority of another Member State**

### **156. Power to conduct an investigation.**

In any of the following cases, the Office of Fair Trading (the 'OFT')<sup>1</sup> may conduct an investigation on behalf of and for the account of the competition authority of another member state<sup>2</sup>:

- (1) where there are reasonable grounds for suspecting that there is an agreement<sup>3</sup> which may affect trade between member states and has as its object or effect the prevention, restriction or distortion of competition within the European Community<sup>4</sup>;
- (2) where there are reasonable grounds for suspecting that the prohibition on abuse of a dominant position in the EC Treaty<sup>5</sup> has been infringed<sup>6</sup>;
- (3) where there are reasonable grounds for suspecting that, at some time in the past, there was an agreement which at that time may have affected trade between member states and had as its object or effect the prevention, restriction or distortion of competition within the European Community<sup>7</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie an investigation pursuant to EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 22(1) (an 'Article 22(1) investigation'). See PARA 92. As to the EC Treaty (ie the Treaty establishing the European Economic Community, Rome, 25th March 1957) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. 'Competition authority of another member state' means a competition authority designated as such under the EC Competition Regulation art 35 by a member state other than the United Kingdom: Competition Act 1998 s 65C(1) (added by SI 2004/1261). As to the meaning of 'United Kingdom' see PARA 401 note 1.

3 A provision of the Competition Act 1998 Pt IIA (ss 65C-65N) which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice: s 65D(6) (added by SI 2004/1261).

4 Competition Act 1998 s 65D(1), (2) (added by SI 2004/1261).

5 Ie the EC Treaty art 82 (see PARA 68 et seq).

6 Competition Act 1998 s 65D(1), (3) (added by SI 2004/1261).

7 Competition Act 1998 s 65D(1), (4) (added by SI 2004/1261). It is immaterial whether the agreement in question remains in existence: Competition Act 1998 s 65D(5) (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(ii) Investigations by the Office of Fair Trading on behalf of the Competition Authority of another Member State/157. Power when conducting investigations.

### **157. Power when conducting investigations.**



For the purposes of an investigation on behalf of and for the account of the competition authority of another member state<sup>1</sup>, the Office of Fair Trading (the 'OFT')<sup>2</sup> may require any person to produce<sup>3</sup> to it a specified<sup>4</sup> document<sup>5</sup>, or to provide it with specified information<sup>6</sup>, which it considers relates to any matter relevant to the investigation<sup>7</sup>. The power is to be exercised by a notice in writing<sup>8</sup> and the notice must indicate the subject matter and purpose of the investigation and the nature of the offences created<sup>9</sup>.

The OFT may also specify in the notice: (1) the time and place at which any document is to be produced or any information is to be provided; and (2) the manner and form in which it is to be produced or provided<sup>10</sup>.

1        Ie an investigation pursuant to EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 22(1) (an 'Article 22(1) investigation'). See PARA 156. As to the EC Treaty (ie the Treaty establishing the European Economic Community, Rome, 25th March 1957) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. As to the meaning of 'Competition authority of another member state' see PARA 156 note 2.

2        As to the OFT see PARAS 6-8.

3        The power to require a person to produce a document includes power: (1) if the document is produced (a) to take copies of it or extracts from it; (b) to require him, or any person who is a present or past officer of his, or is or was at any time employed by him, to provide an explanation of the document; and (2) if the document is not produced, to require him to state, to the best of his knowledge and belief, where it is: Competition Act 1998 s 65E(6) (added by SI 2004/1261).

4        'Specified' means: (1) specified, or described, in the notice; or (2) falling within a category which is specified, or described, in the notice: Competition Act 1998 s 65E(4) (added by SI 2004/1261).

5        As to the meaning of 'document' see PARA 9 note 3; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

6        As to the meaning of 'information' see PARA 9 note 3; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

7        Competition Act 1998 s 65E(1) (added by SI 2004/1261). For the purposes of the Competition Act 1998 Pt IIA (ss 65C-65N), the power to require information, in relation to information recorded otherwise than in a legible form, includes power to require a copy of it in a legible form: s 65C(3) (added by SI 2004/1261). Any power conferred on the OFT by the Competition Act 1998 Pt IIA to require information includes power to require any document which it believes may contain that information: s 65C(4) (added by SI 2004/1261).

8        Competition Act 1998 s 65E(2) (added by SI 2004/1261).

9        Competition Act 1998 s 65E(3) (added by SI 2004/1261). The offences are those created by the Competition Act 1998 ss 65L-65N (see PARA 161).

10       Competition Act 1998 s 65E(5) (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(ii) Investigations by the Office of Fair Trading on behalf of the Competition Authority of another Member State/158. Power to enter business premises without a warrant.

## **158. Power to enter business premises without a warrant.**

Any officer of the Office of Fair Trading (the 'OFT')<sup>1</sup> who is authorised in writing by the OFT to do so (an 'investigating officer') may enter any business premises<sup>2</sup> in connection with an investigation on behalf of and for the account of the competition authority of another member state<sup>3</sup>.

No investigating officer is to enter any premises in the exercise of these powers unless he has given to the occupier of the premises a written notice which gives at least two working days<sup>4</sup> notice of the intended entry, indicates the subject matter and purpose of the investigation and indicates the nature of the offences created<sup>5</sup>. This requirement does not apply if the OFT has a reasonable suspicion that the premises are, or have been, occupied by a party to an agreement which it is investigating<sup>6</sup> or an undertaking the conduct of which it is investigating<sup>7</sup>. It also does not apply if the investigating officer has taken all such steps as are reasonably practicable to give notice but has not been able to do so<sup>8</sup>. Where notice has not been given<sup>9</sup>, the power of entry is to be exercised by the investigating officer on production of evidence of his authorisation and a document indicating the subject matter and purpose of the investigation and the nature of the offences created<sup>10</sup>.

An investigating officer entering any premises under the above provisions may:

- (1) take with him such equipment as appears to him to be necessary<sup>11</sup>;
- (2) require any person on the premises to produce any document<sup>12</sup> which he considers relates to any matter relevant to the investigation and, if the document is produced, to provide an explanation of it<sup>13</sup>;
- (3) require any person to state, to the best of his knowledge and belief, where any such document is to be found<sup>14</sup>;
- (4) take copies of, or extracts from, any document which is produced<sup>15</sup>;
- (5) require any information which is stored in any electronic form and is accessible from the premises and which the investigating officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away, and in which it is visible and legible or from which it can readily be produced in a visible and legible form<sup>16</sup>;
- (6) take any steps which appear to be necessary for the purpose of preserving or preventing interference with any document which he consider relates to any matter relevant to the investigation<sup>17</sup>.

1 As to the OFT see PARAS 6-8.

2 'Business premises' means premises (or any part of premises) not used as a dwelling: Competition Act 1998 s 65F(6) (added by SI 2004/1261). As to the meaning of 'premises' see PARA 130 note 2; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

3 Competition Act 1998 s 65F(1) (added by SI 2004/1261). Such an investigation is one pursuant to EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 22(1) (an 'Article 22(1) investigation'). See PARA 156. As to the EC Treaty (ie the Treaty establishing the European Economic Community, Rome, 25th March 1957) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1. As to the meaning of 'Competition authority of another member state' see PARA 156 note 2.

4 As to the meaning of 'working day' see PARA 130 note 5; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

5 Competition Act 1998 s 65F(2) (added by SI 2004/1261). The offences are those created by the Competition Act 1998 ss 65L-65N (see PARA 161).

6 Ie under the Competition Act 1998 s 65D (see PARA 156).

7 Competition Act 1998 s 65F(3)(a) (added by SI 2004/1261). See note 6.

8 Competition Act 1998 s 65F(3)(b) (added by SI 2004/1261).

- 9       le in a case falling within the Competition Act 1998 s 65F(3) (see the text and notes 6-8).
- 10       Competition Act 1998 s 65F(4) (added by SI 2004/1261).
- 11       Competition Act 1998 s 65F(5)(a) (added by SI 2004/1261).
- 12       As to the meaning of 'document' see PARA 9 note 3; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).
- 13       Competition Act 1998 s 65F(5)(b) (added by SI 2004/1261). As to the power to require information see PARA 157 note 7.
- 14       Competition Act 1998 s 65F(5)(c) (added by SI 2004/1261).
- 15       Competition Act 1998 s 65F(5)(d) (added by SI 2004/1261).
- 16       Competition Act 1998 s 65F(5)(e) (added by SI 2004/1261).
- 17       Competition Act 1998 s 65F(5)(f) (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(ii) Investigations by the Office of Fair Trading on behalf of the Competition Authority of another Member State/159. Power to enter business or domestic premises under a warrant.

### **159. Power to enter business or domestic premises under a warrant.**

On an application made by the Office of Fair Trading (the 'OFT')<sup>1</sup> to the court<sup>2</sup> in accordance with rules of court, a judge may issue a warrant<sup>3</sup> if he is satisfied that: (1) there are reasonable grounds for suspecting that there are on any business premises<sup>4</sup> or domestic premises<sup>5</sup> documents<sup>6</sup> the production of which has been required<sup>7</sup> and which have not been produced as required<sup>8</sup>; (2) there are reasonable grounds for suspecting that there are on any business premises or domestic premises documents which the OFT has power<sup>9</sup> to require to be produced and if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed<sup>10</sup>; or, in relation to business premises only, (3) an investigating officer<sup>11</sup> has attempted to enter premises in the exercise of his powers to enter business premises without a warrant<sup>12</sup> but has been unable to do so and that there are reasonable grounds for suspecting that there are on the premises documents the production of which could have been required under that power<sup>13</sup>.

A warrant under the above provisions authorises a named officer of the OFT and any other of its officers whom the OFT has authorised in writing to accompany the named officer:

- (a)       to enter the premises specified in the warrant, using such force as is reasonably necessary for the purpose<sup>14</sup>;
- (b)       to search the premises and take copies of, or extracts from, any document appearing to be of a kind in respect of which the application was granted (the 'relevant kind')<sup>15</sup>;
- (c)       to take possession of any documents appearing to be of the relevant kind if such action appears to be necessary for preserving the documents or preventing interference with them or it is not reasonably practicable to take copies of the documents on the premises<sup>16</sup>;
- (d)       to take any other steps which appear to be necessary for preserving the documents or preventing interference with them<sup>17</sup>;

- (e) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found<sup>18</sup>;
- (f) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away, and in which it is visible and legible or from which it can readily be produced in a visible and legible form<sup>19</sup>.

A warrant may authorise persons specified in the warrant to accompany the named officer who is executing it<sup>20</sup>. Any person entering premises by virtue of a warrant may take with him such equipment as appears to him to be necessary<sup>21</sup>.

If there is no one at the premises when the officer named in the warrant proposes to execute the warrant he must, before executing it, take such steps as are reasonable in all the circumstances to inform the occupier<sup>22</sup> of the intended entry and, if the occupier is informed, afford him or his legal or other representative a reasonable opportunity to be present when the warrant is executed<sup>23</sup>. If the named officer is unable to inform the occupier of the intended entry he must, when executing the warrant, leave a copy of it in a prominent place on the premises<sup>24</sup>.

On leaving any premises which he has entered by virtue of a warrant, the named officer must, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as he found them<sup>25</sup>.

A warrant under the above provisions continues in force until the end of the period of one month beginning with the day on which it is issued<sup>26</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the meaning of 'court' see PARA 131 note 2; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

3 A warrant issued under the Competition Act 1998 ss 65G, 65H must indicate: (1) the subject matter of the investigation; (2) the nature of the offences created by ss 65L-65N (see PARA 161): s 65I(1) (added by SI 2004/1261). The powers conferred by the Competition Act 1998 ss 65G, 65H are to be exercised on production of a warrant issued under that provision: s 65I(2) (added by SI 2004/1261).

4 'Business premises' means premises (or any part of premises) not used as a dwelling: Competition Act 1998 s 65F(6); definition applied by s 65G(9) (both added by SI 2004/1261). As to the meaning of 'premises' see PARA 130 note 2; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

5 'Domestic premises' means premises (or any part of premises) that are used as a dwelling and are: (1) premises also used in connection with the affairs of an undertaking or association of undertakings; or (2) premises where documents relating to the affairs of an undertaking or association of undertakings are kept: Competition Act 1998 s 65H(9) (added by SI 2004/1261).

6 As to the meaning of 'document' see PARA 9 note 3; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

7 Ie required under the Competition Act 1998 s 65E or s 65F (see PARAS 157-158).

8 Competition Act 1998 ss 65G(1)(a), 65H(1)(a) (both added by SI 2004/1261).

9 Ie under the Competition Act 1998 s 65E (see PARA 157).

10 Competition Act 1998 ss 65G(1)(b), 65H(1)(b) (both added by SI 2004/1261). If, in the case of a warrant under the Competition Act 1998 ss 65G(1)(b), 65H(1)(b), the judge is satisfied that it is reasonable to suspect that there are also on the premises other documents relating to the investigation concerned, the warrant must also authorise action mentioned in ss 65G(2), 65H(2) (see heads (a)-(f) in the text) to be taken in relation to any such document: ss 65G(3), 65H(3) (both added by SI 2004/1261).

11 As to the investigating officer see PARA 158.

- 12      le under the Competition Act 1998 s 65F (see PARA 158).
- 13      Competition Act 1998 s 65G(1)(c) (added by SI 2004/1261).
- 14      Competition Act 1998 ss 65G(2)(a), 65H(2)(a) (both added by SI 2004/1261).
- 15      Competition Act 1998 ss 65G(2)(b), 65H(2)(b) (both added by SI 2004/1261).
- 16      Competition Act 1998 ss 65G(2)(c), 65H(2)(c) (both added by SI 2004/1261). Any document of which possession is taken may be retained for a period of three months: Competition Act 1998 ss 65G(8), 65H(8) (both added by SI 2004/1261).
- 17      Competition Act 1998 ss 65G(2)(d), 65H(2)(d) (both added by SI 2004/1261).
- 18      Competition Act 1998 ss 65G(2)(e), 65H(2)(e) (both added by SI 2004/1261).
- 19      Competition Act 1998 ss 65G(2)(f), 65H(2)(f) (both added by SI 2004/1261).
- 20      Competition Act 1998 ss 65G(4), 65H(4) (both added by SI 2004/1261).
- 21      Competition Act 1998 ss 65G(5), 65H(5) (both added by SI 2004/1261).
- 22      'Occupier', in relation to any premises, means a person whom the named officer reasonably believes is the occupier of those premises: Competition Act 1998 s 65I(5) (added by SI 2004/1261).
- 23      Competition Act 1998 s 65I(3), (5) (added by SI 2004/1261).
- 24      Competition Act 1998 s 65I(4) (added by SI 2004/1261).
- 25      Competition Act 1998 ss 65G(6), 65H(6) (both added by SI 2004/1261).
- 26      Competition Act 1998 ss 65G(7), 65H(7) (both added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(ii) Investigations by the Office of Fair Trading on behalf of the Competition Authority of another Member State/160. Privileged communications and use of statements in prosecution.

## **160. Privileged communications and use of statements in prosecution.**

A person may not be required, in connection with an investigation<sup>1</sup> by the Office of Fair Trading<sup>2</sup>, to produce or disclose a privileged communication<sup>3</sup>. A privileged communication is: (1) a communication between a professional legal adviser and his client; or (2) made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings, which in proceedings in the High Court would be protected from disclosure on grounds of legal professional privilege<sup>4</sup>.

A statement made by a person in connection with such an investigation<sup>5</sup> may not be used in evidence against him on a prosecution for a cartel offence<sup>6</sup> unless, in the proceedings: (a) in giving evidence, he makes a statement inconsistent with it; and (b) evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf<sup>7</sup>.

- 1      le under any provision of the Competition Act 1998 Pt IIA (ss 65C-65N).
- 2      As to the Office of Fair Trading see PARAS 6-8.

3 Competition Act 1998 s 65J(1) (added by SI 2004/1261).

4 Competition Act 1998 s 65J(2) (added by SI 2004/1261). As to legal professional privilege see **LEGAL PROFESSIONS** vol 65 (2008) PARA 719; **LEGAL PROFESSIONS** vol 66 (2009) PARA 1146.

5 le in response to a requirement imposed by virtue of any of the Competition Act 1998 ss 65E-65H (see PARAS 157-159).

6 le an offence under the Enterprise Act 2002 s 188 (see PARA 319).

7 Competition Act 1998 s 65J (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(ii) Investigations by the Office of Fair Trading on behalf of the Competition Authority of another Member State/161. Offences in relation to investigations.

### **161. Offences in relation to investigations.**

A person is guilty of an offence if he fails to comply with a requirement imposed on him in relation to an investigation by the Office of Fair Trading (the 'OFT')<sup>1</sup> conducted on behalf of a competition authority of another member state<sup>2</sup>.

If a person is charged with an offence in respect of a requirement to produce a document<sup>3</sup>, it is a defence for him to prove that the document was not in his possession or under his control and that it was not reasonably practicable for him to comply with the requirement<sup>4</sup>.

If a person is charged with an offence in respect of a requirement: (1) to provide information<sup>5</sup>; (2) to provide an explanation of a document; or (3) to state where a document is to be found, it is a defence for him to prove that he had a reasonable excuse for failing to comply with the requirement<sup>6</sup>.

Failure to comply with a requirement to provide documents or information<sup>7</sup> is not an offence if the person imposing the requirement has failed to act in accordance with the statutory requirements<sup>8</sup>.

A person is guilty of an offence if he intentionally obstructs an officer acting in the exercise of his powers to enter business premises without a warrant<sup>9</sup>.

A person is guilty of an offence if, having been required to produce a document<sup>10</sup>, he intentionally or recklessly destroys or otherwise disposes of it, falsifies it or conceals it, or he causes or permits its destruction, disposal, falsification or concealment<sup>11</sup>.

If information is provided by a person to the OFT in connection with any function of the OFT relating to its power to conduct investigations<sup>12</sup>, that person is guilty of an offence if the information is false or misleading in a material particular and he knows that it is or is reckless as to whether it is<sup>13</sup>. A person who: (a) provides any information to another person, knowing the information to be false or misleading in a material particular; or (b) recklessly provides any information to another person which is false or misleading in a material particular, knowing that the information is to be used for the purpose of providing information to the OFT<sup>14</sup>, is guilty of an offence<sup>15</sup>.

1 As to the OFT see PARAS 6-8.

2 Competition Act 1998 s 65L(1) (added by SI 2004/1261). Such a requirement may be imposed under the Competition Act 1998 s 65E, 65F, 65G or s 65H (see PARAS 157-159). A person guilty of an offence under s

65L(1) is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine: s 65L(6) (added by SI 2004/1261). As to the statutory maximum see PARA 140 note 9. A person who intentionally obstructs an officer in the exercise of his powers under a warrant issued under the Competition Act 1998 s 65G or s 65H (see PARA 159) is guilty of an offence and liable: (a) on summary conviction, to a fine not exceeding the statutory maximum; (b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 65L(7) (added by SI 2004/1261).

3 As to the meaning of 'document' see PARA 9 note 3; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

4 Competition Act 1998 s 65L(2) (added by SI 2004/1261).

5 As to the meaning of 'information' see PARA 9 note 3; definition applied by the Competition Act 1998 s 65C(2) (added by SI 2004/1261).

6 Competition Act 1998 s 65L(3) (added by SI 2004/1261).

7 It imposed under the Competition Act 1998 s 65E or s 65F (see PARAS 157-158).

8 Competition Act 1998 s 65L(4) (added by SI 2004/1261).

9 Competition Act 1998 s 65L(5) (added by SI 2004/1261). The power to enter business premises without a warrant is set out in the Competition Act 1998 s 65F (see PARA 158). A person guilty of an offence under s 65L(5) is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine: s 65L(6) (added by SI 2004/1261).

10 It under the Competition Act 1998 s 65E, 65F, 65G or s 65H (see PARAS 157-159).

11 Competition Act 1998 s 65M(1) (added by SI 2004/1261). A person guilty of such an offence is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: Competition Act 1998 s 65M(2) (added by SI 2004/1261).

12 It in connection with any function of the OFT under the Competition Act 1998 Pt IIA (see PARAS 156-160).

13 Competition Act 1998 s 65N(1) (added by SI 2004/1261). A person guilty of such an offence is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: Competition Act 1998 s 65N(3) (added by SI 2004/1261).

14 It in connection with any of its functions under the Competition Act 1998 Pt IIA (see PARAS 156-160).

15 Competition Act 1998 s 65N(2) (added by SI 2004/1261). A person guilty of such an offence is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: Competition Act 1998 s 65N(3) (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(12) INSPECTIONS ON BEHALF OF THE EUROPEAN COMMISSION OR ANOTHER MEMBER STATE/(iii) Office of Fair Trading's Rules in relation to Inspections/162. Procedural rules in relation to inspections and investigations.

### **(iii) Office of Fair Trading's Rules in relation to Inspections**

#### **162. Procedural rules in relation to inspections and investigations.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may make such rules about procedural and other matters in connection with the carrying into effect of the provisions relating to inspections and investigations<sup>2</sup> as it considers appropriate<sup>3</sup>. If the OFT is preparing any rules it must consult such persons as it considers appropriate<sup>4</sup>. No rule made by the OFT is to come into operation

until it has been approved by an order made by the Secretary of State<sup>5</sup>. The Secretary of State may approve any rule made by the OFT in the form in which it is submitted, or subject to such modifications as he considers appropriate<sup>6</sup>. The Secretary of State may, after consulting the OFT, by order vary or revoke any rules made under this provision<sup>7</sup>.

If the Secretary of State considers that rules should be made with respect to a particular matter he may direct the OFT to exercise its powers and make rules about that matter<sup>8</sup>.

1 As to the OFT see PARAS 6-8.

2 I.e. the provisions of the Competition Act 1998 Pt II (ss 61-65B) and Pt IIA (ss 65C-65N).

3 Competition Act 1998 s 75A(1) (added by SI 2004/1261). See the Competition Act 1998 (Office of Fair Trading's Rules) Order 2004, SI 2004/2751.

4 Competition Act 1998 s 75A(2) (added by SI 2004/1261).

5 Competition Act 1998 s 75A(3) (added by SI 2004/1261). As to the Secretary of State see PARA 5.

6 Competition Act 1998 s 75A(4) (added by SI 2004/1261). If the Secretary of State proposes to approve a rule subject to modifications he must inform the OFT of the proposed modifications and take into account any comments made by the OFT: Competition Act 1998 s 75A(5) (added by SI 2004/1261). The provisions of the Competition Act 1998 s 75A(3)-(5) apply also to any alteration of the rules made by the OFT: s 75A(6) (added by SI 2004/1261).

7 Competition Act 1998 s 75A(7) (added by SI 2004/1261).

8 Competition Act 1998 s 75A(8) (added by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(13) MISCELLANEOUS PROVISIONS/163. Regulations, orders and rules.

## **(13) MISCELLANEOUS PROVISIONS**

### **163. Regulations, orders and rules.**

Any power to make regulations or orders which is conferred by the Competition Act 1998 is exercisable by statutory instrument<sup>1</sup>. Any statutory instrument made under the Competition Act 1998 may: (1) contain such incidental, supplemental, consequential and transitional provision as the Secretary of State<sup>2</sup> considers appropriate; and (2) make different provision for different cases<sup>3</sup>.

1 Competition Act 1998 s 71(1). No order may be made under s 3 (see PARA 117), s 19 (see PARA 126), s 36(8) (see PARA 137), s 45(8) (see PARA 11) or s 50 (see PARA 142), unless a draft of the order has been laid before Parliament and approved by a resolution of each House: s 71(4) (amended by the Enterprise Act 2002 s 278(1), Sch 25 para 38(1), (49)). Any statutory instrument made under the Competition Act 1998, apart from one made under any of the provisions mentioned in s 71(4), or under s 76(3) (commencement), is subject to annulment by a resolution of either House of Parliament: s 71(5). The power to make rules under s 48 is also exercisable by statutory instrument, and accordingly s 71(3), (5) applies: see s 71(2).

2 As to the Secretary of State see PARA 5.

3 Competition Act 1998 s 71(3).



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(13) MISCELLANEOUS PROVISIONS/164. Offences by bodies corporate etc.

#### **164. Offences by bodies corporate etc.**

If an offence<sup>1</sup> committed by a body corporate is proved (1) to have been committed with the consent or connivance of an officer<sup>2</sup>; or (2) to be attributable to any neglect on his part, the officer as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly<sup>3</sup>.

1 This applies to any offence under any of the Competition Act 1998 ss 42-44 (see PARAS 140-141), s 65 (see PARA 154) or ss 65L-65N (see PARA 161): s 72(1) (amended by SI 2004/1261).

2 For these purposes 'officer', in relation to a body corporate, means a director, manager, secretary or other similar officer of the body, or a person purporting to act in any such capacity: Competition Act 1998 s 72(3).

3 Competition Act 1998 s 72(2). If the affairs of a body corporate are managed by its members, s 72(2) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 72(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(13) MISCELLANEOUS PROVISIONS/165. Crown application.

#### **165. Crown application.**

Any provision made by or under the Competition Act 1998 binds the Crown<sup>1</sup> except that:

- (1) the Crown is not criminally liable as a result of any such provision<sup>2</sup>;
- (2) the Crown is not liable for any penalty under any such provision<sup>3</sup>; and
- (3) nothing in the Act affects Her Majesty in her private capacity<sup>4</sup>.

If an investigation is conducted by the Office of Fair Trading (the 'OFT')<sup>5</sup> in respect of an agreement<sup>6</sup> where none of the parties is the Crown or a person in the public service of the Crown, or in respect of conduct<sup>7</sup> otherwise than by the Crown or such a person then: (a) the power to enter business premises without a warrant<sup>8</sup> may not be exercised in relation to land which is occupied by a government department, or otherwise for purposes of the Crown, without the written consent of the appropriate person<sup>9</sup>; and (b) provision relating to the power to enter business or domestic premises under a warrant<sup>10</sup> does not apply in relation to land so occupied<sup>11</sup>. Provisions relating to the power to enter premises with respect to European Commission investigations<sup>12</sup> do not apply in relation to land which is occupied by a government department, or otherwise for purposes of the Crown, unless the matter being investigated is an agreement to which the Crown or a person in the service of the Crown is a party, or conduct by the Crown or such a person<sup>13</sup>. If the Secretary of State certifies that it appears to him to be in the interests of national security that powers of entry<sup>14</sup> should not be exercisable in relation to premises held or used by or on behalf of the Crown and which are specified in the certificate, those powers are not exercisable in relation to those premises<sup>15</sup>.

1 Competition Act 1998 s 73(1). Any amendment, repeal or revocation made by the Competition Act 1998 binds the Crown to the extent that the enactment amended, repealed or revoked binds the Crown: s 73(9).

2 Competition Act 1998 s 73(1)(a). Head (1) in the text does not affect the application of any provision of the Act in relation to persons in the public service of the Crown: s 73(2).

3 Competition Act 1998 s 73(1)(b).

4 Competition Act 1998 s 73(1)(c). Head (3) in the text is to be interpreted as if the Crown Proceedings Act 1947 s 38(3) (interpretation of references in that Act to Her Majesty in her private capacity: see **CROWN PROCEEDINGS AND CROWN PRACTICE** vol 12(1) (Reissue) PARA 103) were contained in the Competition Act 1998: s 73(3).

5 Ie under the Competition Act 1998 s 25 (see PARA 129) or s 65D (see PARA 156). As to the OFT see PARAS 6-8.

6 In the Competition Act 1998 s 73(4), (6), 'agreement' includes a suspected agreement and is to be read as applying equally to, or in relation to, a decision by an association of undertakings or a concerted practice: s 73(6A) (added by SI 2004/1261).

7 In the Competition Act 1998 s 73(4), (6), 'conduct' includes suspected conduct: s 73(6A) (added by SI 2004/1261).

8 Ie under the Competition Act 1998 s 27 (see PARA 130) or (as the case may be) s 65F (see PARA 158).

9 Competition Act 1998 s 73(4)(a) (substituted by SI 2004/1261). In any case in which such consent is required, the person who is the appropriate person in relation to that case is to be determined in accordance with regulations made by the Secretary of State: Competition Act 1998 s 73(5). For that purpose 'appropriate person' means: (1) in relation to any land which is occupied by a government department, that department; and (2) in relation to any other land which is otherwise occupied for purposes of the Crown, the person occupying the land for such purposes: Competition Act 1998 (Definition of Appropriate Person) Regulations 1999, SI 1999/2282, reg 2. As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163. As to the Secretary of State see PARA 5.

10 Ie under a warrant issued by virtue of the Competition Act 1998 ss 28, 28A (see PARA 131), ss 65G, 65H (see PARA 159).

11 Competition Act 1998 s 73(4)(b) (substituted by SI 2004/1261).

12 Ie the Competition Act 1998 ss 62, 62A, 63 (see PARAS 151-153).

13 Competition Act 1998 s 73(6) (amended by SI 2004/1261). See notes 6, 7.

14 Ie powers conferred by the Competition Act 1998 s 27 (see PARA 130) or s 65F (see PARA 158), or that may be conferred by a warrant under ss 28, 28A (see PARA 131), ss 62, 62A, 63, 65G or s 65H (see PARAS 151, 152, 153, 159).

15 Competition Act 1998 s 73(8) (amended by SI 2004/1261).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(14) APPEALS TO THE COMPETITION APPEAL TRIBUNAL/166. Appealable decisions.

## **(14) APPEALS TO THE COMPETITION APPEAL TRIBUNAL**

### **166. Appealable decisions.**

Any party to an agreement in respect of which the Office of Fair Trading (the 'OFT')<sup>1</sup> has made a decision<sup>2</sup> may appeal to the Competition Appeal Tribunal<sup>3</sup> against, or with respect to, the decision<sup>4</sup>. Any person<sup>5</sup> in respect of whose conduct the OFT has made a decision may appeal to

the Tribunal against, or with respect to, the decision<sup>6</sup>. Except in the case of an appeal against the imposition, or the amount, of a penalty<sup>7</sup>, the making of an appeal under the provisions described above does not suspend the effect of the decision to which the appeal relates<sup>8</sup>.

The Tribunal must determine the appeal<sup>9</sup> on the merits by reference to the grounds of appeal set out in the notice of appeal<sup>10</sup>. The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it<sup>11</sup>, and may:

- (1) remit the matter to the OFT<sup>12</sup>;
- (2) impose or revoke, or vary the amount of, a penalty<sup>13</sup>;
- (3) give such directions, or take such other steps, as the OFT could itself have given or taken<sup>14</sup>; or
- (4) make any other decision which the OFT could itself have made<sup>15</sup>.

Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT<sup>16</sup>. If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based<sup>17</sup>.

In relation to an appeal regarding commitments<sup>18</sup>, the Tribunal must, by reference to the grounds of appeal set out in the notice of appeal, determine the appeal by applying the same principles as would be applied by a court on an application for judicial review<sup>19</sup>. The Tribunal may: (a) dismiss the appeal or quash the whole or part of the decision to which it relates; and (b) where it quashes the whole or part of that decision, remit the matter back to the OFT with a direction to reconsider and make a new decision in accordance with the ruling of the Tribunal<sup>20</sup>.

Proceedings in the High Court should be stayed when an appeal to the Tribunal is pending<sup>21</sup>.

1 As to the OFT see PARAS 6-8.

2 In this provision, 'decision' means a decision of the OFT:

- (1) as to whether the Chapter I prohibition has been infringed (see PARA 116);
- (2) as to whether the prohibition in the EC Treaty art 81(1) has been infringed (see PARA 61 et seq);
- (3) as to whether the Chapter II prohibition has been infringed (see PARA 125);
- (4) as to whether the prohibition in the EC Treaty art 82 has been infringed (see PARA 68 et seq);
- (5) cancelling a block or parallel exemption (see PARAS 121, 123);
- (6) withdrawing the benefit of a regulation of the European Commission pursuant to the EC Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1, 4.1.03, p 1) (the 'Modernisation Regulation') art 29(2) (see PARA 29);
- (7) not releasing commitments pursuant to a request made under the Competition Act 1998 s 31A(4)(b)(i) (see PARA 134);
- (8) releasing commitments under s 31A(4)(b)(ii) (see PARA 134);
- (9) as to the imposition of any penalty under s 36 or as to the amount of any such penalty (see PARA 137),

and includes a direction given under s 32, s 33 or s 35 (see PARAS 135-136) and such other decisions under Pt I (ss 1-60) as may be prescribed: s 46(3) (substituted by SI 2004/1261). As to the EC Treaty (ie the Treaty

establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

Three further appealable decisions have been prescribed by the Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004, SI 2004/1078, reg 2, namely:

- (a) a decision of the OFT imposing conditions or obligations subject to which a parallel exemption is to have effect;
- (b) a decision of the OFT imposing one or more additional conditions or obligations subject to which a parallel exemption is to have effect; and
- (c) a decision of the OFT varying or removing any such condition or obligation.

As to the Chapter I prohibition see PARA 116. As to the Chapter II prohibition see PARA 125. Where no view has been expressed on the question whether there has been an infringement of the Chapter II prohibition, there is no appealable decision: *Independent Water Co Ltd v Water Services Regulation Authority* [2007] CAT 6, [2007] All ER (D) 264 (Jan).

3 As to the Competition Appeal Tribunal see PARAS 13-17.

4 Competition Act 1998 s 46(1) (amended by the Enterprise Act 2002 ss 21, 278(1), Sch 5 paras 1, 2(a), Sch 25 para 38(1), (36)). An appeal to the Competition Appeal Tribunal must be made by sending a notice of appeal to it within the specified period: Competition Act 1998 s 46(5), Sch 8 para 2(1) (amended by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (3)(a)). The notice of appeal must set out the grounds of appeal in sufficient detail to indicate: (1) under which provision of the Competition Act 1998 the appeal is brought; (2) to what extent (if any) the appellant contends that the decision against, or with respect to which, the appeal is brought was based on an error of fact or was wrong in law; and (3) to what extent (if any) the appellant is appealing against the OFT's exercise of its discretion in making the disputed decision: Sch 8 para 2(2) (amended by the Enterprise Act 2002 Sch 25 para 38(1), (54)(b)). The Tribunal may give an appellant leave to amend the grounds of appeal identified in the notice of appeal: Competition Act 1998 Sch 8 para 2(3) (amended by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (3)(b)). In the Competition Act 1998 Sch 8 para 2, references to the Tribunal are to the Tribunal as constituted (in accordance with the Enterprise Act 2002 s 14 (see PARA 15)) for the purposes of the proceedings in question: Competition Act 1998 Sch 8 para 2(4) (added by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (3)(c)). Nothing in the Competition Act 1998 Sch 8 para 2 restricts the power under the Enterprise Act 2002 s 15 (Tribunal rules) (see PARA 16) to make provision as to the manner of instituting proceedings before the Tribunal: Competition Act 1998 Sch 8 para 2(5) (added by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (3)(c)).

5 As to the meaning of 'person' see PARA 118 note 8.

6 Competition Act 1998 s 46(2) (amended by the Enterprise Act 2002 Sch 5 paras 1, 2(a), Sch 25 para 38(1), (36)).

7 As to penalties see the Competition Act 1998 ss 36-40 (see PARAS 137-139).

8 Competition Act 1998 s 46(4).

9 The provisions in the Competition Act 1998 Sch 8 para 3 apply to any appeal under s 46 or s 47 (see PARA 167) other than: (1) an appeal under s 46 against, or with respect to, a decision of the kind specified in s 46(3) (g) or (h) (see note 2 heads (7), (8)); and (2) an appeal under s 47(1)(b) or (c) (see PARA 167): Sch 8 para 3(A1) (added by SI 2004/1261).

10 Competition Act 1998 Sch 8 para 3(1) (amended by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (4)).

11 Competition Act 1998 Sch 8 para 3(2) (amended by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (4)).

12 Competition Act 1998 Sch 8 para 3(2)(a) (amended by the Enterprise Act 2002 Sch 25 paras 38(1), 54(a)).

13 Competition Act 1998 Sch 8 para 3(2)(b).

14 Competition Act 1998 Sch 8 para 3(2)(d) (amended by the Enterprise Act 2002 Sch 25 paras 38(1), 54(a), (c)).

15 Competition Act 1998 Sch 8 para 3(2)(e) (amended by the Enterprise Act 2002 Sch 25 paras 38(1), 54(a), (c)). See *VIP Communications Ltd v Office of Communications (T-Mobile (UK) Ltd intervening)* [2007] CAT 3, [2007] All ER (D) 138 (Jan).

16 Competition Act 1998 Sch 8 para 3(3) (amended by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (4), Sch 25 paras 38(1), 54(a), (c)).

17 Competition Act 1998 Sch 8 para 3(4) (amended by the Enterprise Act 2002 Sch 5 paras 1, 8(1), (4)).

18 Ie any appeal under the Competition Act 1998 s 46 against, or with respect to, a decision of the kind specified in s 46(3)(g) or (h) (see note 2 heads (7), (8)), and any appeal under s 47(1)(b) or (c) (see PARA 167).

19 Competition Act 1998 Sch 8 para 3A(1), (2) (added by SI 2004/1261). As to judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 601 et seq.

20 Competition Act 1998 Sch 8 para 3A(3) (added by SI 2004/1261).

21 *Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd* [2002] ICR 112, [2001] All ER (D) 360 (Mar).

## UPDATE

### 166 Appealable decisions

NOTE 19--See *British Sky Broadcasting Group plc v Competition Commission; Virgin Media Inc v Competition Commission* [2010] EWCA Civ 2, [2010] All ER (D) 130 (Jan).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(14) APPEALS TO THE COMPETITION APPEAL TRIBUNAL/167. Third party appeals.

### 167. Third party appeals.

A person<sup>1</sup> who is not a party to an agreement respecting which a decision has been made, or who is not a person in respect of whose conduct a decision has been made<sup>2</sup> may appeal to the Competition Appeal Tribunal<sup>3</sup> with respect to certain decisions<sup>4</sup> of the Office of Fair Trading (the 'OFT')<sup>5</sup>. It is a question of fact whether an appealable decision has been taken; whether a decision has been taken is a question of substance, not form and may have been made either expressly or by necessary implication<sup>6</sup>.

A person may make such an appeal only if the Tribunal considers that he has a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest<sup>7</sup>.

The making of an appeal does not suspend the effect of the decision to which the appeal relates<sup>8</sup>.

1 As to the meaning of 'person' see PARA 118 note 8.

2 Ie a person who does not fall within the Competition Act 1998 s 46(1) or (2) (see PARA 166).

3 As to the Competition Appeal Tribunal see PARAS 13-17.

4 Ie one of the following decisions (see the Competition Act 1998 s 47(1)(a)-(f) (substituted by SI 2004/1261)):

(1) a decision falling within s 46(3)(a)-(f) (see PARA 166 note 2, heads (1)-(6));

(2) a decision falling within s 46(3)(g) (see PARA 166 note 2, head (7));

- (3) a decision of the OFT to accept or release commitments under s 31A (see PARA 134), or to accept a variation of such commitments other than a variation which is not material in any respect;
- (4) a decision of the OFT to make directions under s 35 (see PARA 136);
- (5) a decision of the OFT not to make directions under s 35; or
- (6) such other decision of the OFT under Pt I (ss 1-60) as may be prescribed.

Three further appealable decisions have been prescribed by the Competition Act 1998 (Appealable Decisions and Revocation of Notification of Excluded Agreements) Regulations 2004, SI 2004/1078, reg 2, namely:

- (a) a decision of the OFT imposing conditions or obligations subject to which a parallel exemption is to have effect;
- (b) a decision of the OFT imposing one or more additional conditions or obligations subject to which a parallel exemption is to have effect; and
- (c) a decision of the OFT varying or removing any such condition or obligation.

As to the power to make subordinate legislation under the Competition Act 1998 see PARA 163.

5 Competition Act 1998 s 47(1) (substituted by SI 2004/1261). As to the OFT see PARAS 6-8.

6 See *Claymore Dairies Ltd v Director General of Fair Trading (Robert Wiseman Dairies plc intervening)* [2003] All ER (D) 357 (Mar), CCAT; *Freeserve.com plc v Director General of Telecommunications (BT Group plc intervening)* [2002] All ER (D) 152 (Nov), CCAT.

7 Competition Act 1998 s 47(2) (substituted by the Enterprise Act 2002 s 17).

8 Competition Act 1998 s 47(3) (substituted by the Enterprise Act 2002 s 17).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(14) APPEALS TO THE COMPETITION APPEAL TRIBUNAL/168. Monetary claims before the Competition Appeal Tribunal.

## **168. Monetary claims before the Competition Appeal Tribunal.**

In relation to any claim for damages, or any other claim for a sum of money, which a person<sup>1</sup> who has suffered loss or damage as a result of the infringement of a relevant prohibition<sup>2</sup> may make in civil proceedings brought in any part of the United Kingdom<sup>3</sup>, the following provisions apply<sup>4</sup>.

For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded<sup>5</sup>. Such a claim may be made in proceedings brought before the Competition Appeal Tribunal<sup>6</sup>. No claim may be made in such proceedings until a decision<sup>7</sup> has established that the relevant prohibition in question has been infringed<sup>8</sup>. A claim may also not be made otherwise than with the permission of the Tribunal, during any specified period<sup>9</sup> which relates to that decision<sup>10</sup>.

In determining a claim, the Tribunal is bound by any decision<sup>11</sup> which establishes that the prohibition in question has been infringed<sup>12</sup>.

The right to make a claim in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim<sup>13</sup>.

1 As to the meaning of 'person' see PARA 118 note 8.

2 'Relevant prohibition' means any of the following (see the Competition Act 1998 s 47A(2) (added by the Enterprise Act 2002 s 18(1))):

- (1) the Chapter I prohibition (see PARA 116);
- (2) the Chapter II prohibition (see PARA 125);
- (3) the prohibition in the EC Treaty art 81(1) (see PARA 61 et seq);
- (4) the prohibition in the EC Treaty art 82 (see PARA 68 et seq).

As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

3 As to the meaning of 'United Kingdom' see PARA 401 note 1.

4 Competition Act 1998 s 47A(1) (added by the Enterprise Act 2002 s 18(1)).

5 Competition Act 1998 s 47A(3) (added by the Enterprise Act 2002 s 18(1)). See **LIMITATION PERIODS** vol 68 (2008) PARA 915 et seq.

6 Competition Act 1998 s 47A(4) (added by the Enterprise Act 2002 s 18(1)). The making of such a claim is subject to the provisions of the Competition Act 1998 and Tribunal rules: s 47A(4) (as so added). As to the Competition Appeal Tribunal see PARAS 13-17. As to time limits for making claims see PARA 16; and as to the enforcement of decisions of the Tribunal see PARA 15.

7 The decisions which may be relied on for the purposes of proceedings under the Competition Act 1998 s 47A are (see s 47A(6) (added by the Enterprise Act 2002 s 18(1))):

- (1) a decision of the Office of Fair Trading (the 'OFT') that the Chapter I prohibition (see PARA 116) or the Chapter II prohibition (see PARA 125) has been infringed;
- (2) a decision of the OFT that the prohibition in the EC Treaty art 81(1) (see PARA 61 et seq) or art 82 (see PARA 68 et seq) has been infringed;
- (3) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in the EC Treaty art 81(1) or art 82 has been infringed; or
- (4) a decision of the European Commission that the prohibition in the EC Treaty art 81(1) or art 82 has been infringed.

8 Competition Act 1998 s 47A(5)(a) (added by the Enterprise Act 2002 s 18(1)).

9 The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in the Competition Act 1998 s 47A(6)(a), (b) or (c) (see note 7 heads (1)-(3)) may not be brought without permission are: (1) in the case of a decision of the OFT, the period during which an appeal may be made to the Tribunal under s 46 or s 47 (see PARAS 166-167); (2) in the case of a decision of the OFT which is the subject of an appeal mentioned in head (1) above, the period following the decision of the Tribunal on the appeal during which a further appeal may be made under s 49 (see PARA 170); (3) in the case of a decision of the Tribunal mentioned in s 47A(6)(c) (see note 7 head (3)), the period during which a further appeal may be made under s 49 (see PARA 170); (4) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal; and, where any appeal mentioned in head (1), (2), (3) or (4) above is made, the period specified includes the period before the appeal is determined: s 47A(7) (added by the Enterprise Act 2002 s 18(1); and amended by SI 2007/1846). As from 1 October 2009, the reference to the House of Lords is replaced by a reference to the Supreme Court: see the Competition Act 1998 s 47A(7) (prospectively amended by the Constitutional Reform Act 2005 s 40(4), Sch 9 Pt 1).

The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are: (a) the period during which proceedings against the decision or finding may be instituted in the European Court; and (b) if any such proceedings are instituted, the period before those proceedings are determined: Competition Act 1998 s 47A(8) (added by the Enterprise Act 2002 s 18(1)). See *BCL Old Co Ltd v BASF SE* [2009] EWCA Civ 434, [2009] All ER (D) 212 (May).

- 10 Competition Act 1998 s 47A(5)(b) (added by the Enterprise Act 2002 s 18(1)).
- 11 ie any decision mentioned in the Competition Act 1998 s 47A(6) (see note 7).
- 12 Competition Act 1998 s 47A(9) (added by the Enterprise Act 2002 s 18(1)).
- 13 Competition Act 1998 s 47A(10) (added by the Enterprise Act 2002 s 18(1)).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(14) APPEALS TO THE COMPETITION APPEAL TRIBUNAL/169. Claims brought on behalf of consumers.

### **169. Claims brought on behalf of consumers.**

A specified body<sup>1</sup> may bring proceedings before the Competition Appeal Tribunal<sup>2</sup> which comprise consumer claims<sup>3</sup> made or continued on behalf of at least two individuals<sup>4</sup>. A consumer claim may be included in such proceedings if it is: (1) a claim made in the proceedings on behalf of the individual concerned by the specified body; or (2) a claim made by the individual concerned<sup>5</sup> which is continued in the proceedings on his behalf by the specified body; and such a claim may only be made or continued in the proceedings with the consent of the individual concerned<sup>6</sup>. The consumer claims included in such proceedings must all relate to the same infringement<sup>7</sup>.

Any damages or other sum (not being costs or expenses) awarded in respect of a consumer claim included in proceedings under the provisions set out above must be awarded to the individual concerned; but the Tribunal may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body (acting on behalf of the individual)<sup>8</sup>.

1 'Specified' means specified in an order made by the Secretary of State, in accordance with criteria to be published by the Secretary of State for these purposes: Competition Act 1998 s 47B(9) (added by the Enterprise Act 2002 s 19). As to the Secretary of State see PARA 5. An application by a body to be specified in an order is to be made in a form approved by the Secretary of State for the purpose: Competition Act 1998 s 47B(10) (added by the Enterprise Act 2002 s 19). The Consumers' Association is specified for these purposes: see the Specified Body (Consumer Claims) Order 2005, SI 2005/2365, art 2. As to the Consumers' Association see PARA 342 note 9.

2 As to the Competition Appeal Tribunal see PARAS 13-17.

3 'Consumer claim' means a claim to which the Competition Act 1998 s 47A applies (see PARA 168) which an individual has in respect of an infringement affecting (directly or indirectly) goods or services to which: (1) the individual received, or sought to receive, otherwise than in the course of a business carried on by him (notwithstanding that he received or sought to receive them with a view to carrying on a business); and (2) were, or would have been, supplied to the individual (in the case of goods whether by way of sale or otherwise) in the course of a business carried on by the person who supplied or would have supplied them: s 47B(7) (added by the Enterprise Act 2002 s 19). A business includes: (a) a professional practice; (b) any other undertaking carried on for gain or reward; (c) any undertaking in the course of which goods or services are supplied otherwise than free of charge: Competition Act 1998 s 47B(8) (added by the Enterprise Act 2002 s 19).

4 Competition Act 1998 s 47B(1) (added by the Enterprise Act 2002 s 19), which is expressed to be subject to the provisions of the Competition Act 1998 and Tribunal rules. As to time limits for making claims see PARA 16; and as to the enforcement of decisions of the Tribunal see PARA 15.

5 ie a claim made under the Competition Act 1998 s 47A (see PARA 168).

6 Competition Act 1998 s 47B(3) (added by the Enterprise Act 2002 s 19). The provisions of the Competition Act 1998 s 47A(5)-(10) (see PARA 168) apply to a consumer claim included in proceedings under s



47B as they apply to a claim made in proceedings under s 47A: s 47B(5) (added by the Enterprise Act 2002 s 19).

7 Competition Act 1998 s 47B(4) (added by the Enterprise Act 2002 s 19).

8 Competition Act 1998 s 47B(6) (added by the Enterprise Act 2002 s 19).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/3. THE COMPETITION ACT 1998/(14) APPEALS TO THE COMPETITION APPEAL TRIBUNAL/170. Further appeals.

### **170. Further appeals.**

An appeal lies to the Court of Appeal<sup>1</sup>: (1) from a decision of the Competition Appeal Tribunal<sup>2</sup> as to the amount of a penalty<sup>3</sup>; (2) from a decision of the Tribunal as to the award of damages or other sum in respect of a monetary claim before the Tribunal<sup>4</sup> or included in proceedings brought on behalf of consumers<sup>5</sup> (other than a decision on costs or expenses) or as to the amount of any such damages or other sum; and (3) on a point of law arising from any other decision of the Tribunal on an appeal<sup>6</sup>. An appeal may be brought by a party to the proceedings before the Tribunal or by a person who has a sufficient interest in the matter<sup>7</sup>. An appeal requires the permission of the Tribunal or the Court of Appeal<sup>8</sup>.

1 See the Competition Act 1998 s 49(3) (substituted by the Enterprise Act 2002 s 21, Sch 5 paras 1, 4).

2 As to the Competition Appeal Tribunal see PARAS 13-17.

3 lie under the Competition Act 1998 s 36 (see PARA 137). As to penalties see ss 36-41; and PARAS 137-139.

4 lie made in proceedings under the Competition Act 1998 s 47A (see PARA 168).

5 lie under the Competition Act 1998 s 47B (see PARA 169).

6 Competition Act 1998 s 49(1) (substituted by the Enterprise Act 2002 Sch 5 paras 1, 4). An appeal is made under the Competition Act 1998 s 46 or s 47 (see PARAS 166-167).

7 Competition Act 1998 s 49(2)(a) (substituted by the Enterprise Act 2002 Sch 5 paras 1, 4).

8 Competition Act 1998 s 49(2)(b) (substituted by the Enterprise Act 2002 Sch 5 paras 1, 4).

### **UPDATE**

### **170 Further appeals**

NOTE 6--See *Enron Coal Services Ltd (in liq) v English Welsh & Scottish Railway Ltd* [2009] EWCA Civ 647, [2009] All ER (D) 26 (Jul) (tribunal should not have allowed some claims to survive merely on the basis that they were arguable and should have decided if it was clear from the decision that a finding of infringement had been made).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(1) INTRODUCTION/171. The Enterprise Act 2002.

## 4. THE

### (1) INTRODUCTION

#### 171. The Enterprise Act 2002.

The Enterprise Act 2002 implemented the Government's intention to give more independence to the competition authorities, to reform the bankruptcy laws and to tackle trading practices that harm consumers<sup>1</sup>.

Part 1 of the Enterprise Act 2002 establishes the Office of Fair Trading (the 'OFT')<sup>2</sup>, sets out its general functions, and provides for arrangements for making super-complaints to the OFT<sup>3</sup>. Part 2 establishes and makes provisions for proceedings before the Competition Appeal Tribunal<sup>4</sup>. Part 3 provides for a new merger regime, the definition of a qualifying merger and the duty of the OFT to make references to the Competition Commission<sup>5</sup>; the determination of references; the procedures that relate to certain public interest cases and other special cases; powers of enforcement; undertakings and orders; and various supplementary matters, such as information and publicity requirements and powers to require information<sup>6</sup>. Part 4 makes provision for market investigations and sets out the power of the OFT and the Secretary of State<sup>7</sup> to make references to the Competition Commission, and how the Commission should report on the references. It provides for particular arrangements to apply in public interest cases, and also covers powers of enforcement and various supplementary matters<sup>8</sup>. Part 5 contains provisions relating to the Competition Commission, and provides for its rules of procedure<sup>9</sup>. Part 6 is concerned with cartel offences<sup>10</sup>. Part 7 deals with miscellaneous competition provisions, including powers to disqualify directors who engage in serious competition breaches<sup>11</sup>. There is also specific provision allowing changes to be made in the light of reform of Community competition law<sup>12</sup>. Part 8 sets out procedures for enforcing certain consumer legislation<sup>13</sup>. Part 9 governs the disclosure of information held by public authorities<sup>14</sup>. Part 10 introduces a new insolvency regime for company administration restricting the future use of administrative receivership; abolishes Crown preference; establishes a new regime for the insolvency of individuals; and makes changes to the operation of the Insolvency Services Account<sup>15</sup>. Supplementary provisions are contained in Part 11<sup>16</sup>, including the power of the Secretary of State to provide financial assistance of consumer purposes<sup>17</sup> and financial provision generally<sup>18</sup>.

1 See the White Papers '*Productivity and Enterprise: A World Class Competition Regime*' (Cm 5233) (July 2001), '*Productivity and Enterprise: Insolvency - A Second Chance*' (Cm 5234) (July 2001) and '*Modern Markets: Confident Consumers*' (Cm 4410) (July 1999).

2 As to the OFT see PARAS 6-8.

3 See the Enterprise Act 2002 Pt 1 (ss 1-11); and PARAS 6-8.

4 See the Enterprise Act 2002 Pt 2 (ss 12-21); and PARAS 13-17.

5 As to the Competition Commission see PARAS 9-12.

6 See the Enterprise Act 2002 Pt 3 (ss 22-130); and PARAS 172-275. The provisions of Pt 3 are modified in relation to mergers and merger references of water enterprises: see the Water Mergers (Modification of Enactments) Regulations 2004, SI 2004/3202; and **WATER AND WATERWAYS** vol 100 (2009) PARA 151. See also the disapplication of the Enterprise Act 2002 Pt 3 by the Bradford & Bingley plc Transfer of Securities and Property etc Order 2008, SI 2008/2546, art 40.

7 As to the Secretary of State see PARA 5.

8 See the Enterprise Act 2002 Pt 4 (ss 131-184); and PARAS 276-318.

9 See the Enterprise Act 2002 Pt 5 (ss 185-187); and PARAS 9-12.

10 See the Enterprise Act 2002 Pt 6 (ss 188-202); and PARAS 319-325.

11 See the Enterprise Act 2002 Pt 7 (ss 203-209). See further the Company Directors Disqualification Act 1986 ss 9A-9E (added by the Enterprise Act 2002 s 204); and **COMPANIES** vol 15 (2009) PARAS 1585-1588.

12 The Secretary of State may by regulations make such modifications of the Competition Act 1998 as he considers appropriate for the purpose of eliminating or reducing any differences between: (1) the domestic provisions of the Competition Act 1998; and (2) European Community competition law, which result (or would otherwise result) from a relevant Community instrument made after the passing of the Enterprise Act 2002 (ie 7 November 2002): s 209(1). 'The domestic provisions of the Competition Act 1998' means the provisions of that Act so far as they do not implement or give effect to a relevant Community instrument; 'European Community competition law' includes any Act or subordinate legislation so far as it implements or gives effect to a relevant Community instrument; and 'relevant Community instrument' means a regulation or directive under the EC Treaty art 83: Enterprise Act 2002 s 209(2). As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The Secretary of State may by regulations repeal or otherwise modify any provision of an Act (other than the Competition Act 1998) which excludes any matter from the Chapter I prohibition or the Chapter II prohibition (see PARA 115): Enterprise Act 2002 s 209(3). The power under s 209(3) may not be exercised before the power under s 209(1) has been exercised nor may it be used so as to extend the scope of any exclusion that is not being removed by the regulations: s 209(4). Regulations under s 209 may confer power to make subordinate legislation, may make such consequential, supplementary, incidental, transitory, transitional or saving provision as the Secretary of State considers appropriate (including provision modifying any Act or subordinate legislation) and may make different provision for different cases or circumstances: s 209(5). The power to make regulations under s 209 is exercisable by statutory instrument: s 209(6). No regulations may be made under s 209 unless a draft of them has been laid before and approved by a resolution of each House of Parliament: s 209(7). The restriction on powers to legislate in the European Communities Act 1972 Sch 2 para 1(1)(c) does not apply to regulations which implement or give effect to a relevant Community instrument made after 7 November 2002: Enterprise Act 2002 s 209(8). At the date at which this volume states the law no such regulations had been made.

13 See the Enterprise Act 2002 Pt 8 (ss 210-236); and PARAS 339-360.

14 See the Enterprise Act 2002 Pt 9 (ss 237-247); and PARAS 326-335.

15 See the Enterprise Act 2002 Pt 10 (ss 248-272), which replaces the Insolvency Act 1986 Pt II; and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 213 et seq.

16 See the Enterprise Act 2002 Pt 11 (ss 273-281).

17 The Secretary of State may give financial assistance to any person for the purpose of assisting: (1) activities which the Secretary of State considers are of benefit to consumers; or (2) the provision of (a) advice or information about consumer matters; (b) educational materials relating to consumer matters; or (c) advice or information to the Secretary of State in connection with the formulation of policy in respect of consumer matters: Enterprise Act 2002 s 274.

18 There is to be paid out of money provided by Parliament: (1) any expenditure incurred by the OFT, the Secretary of State, any other minister of the Crown or a government department by virtue of the Enterprise Act 2002; and (2) any increase attributable to the Enterprise Act 2002 in the sums payable out of money so provided by virtue of any other Act: Enterprise Act 2002 s 275.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/172. Duty to make references.

## **(2) MERGERS**

### **(i) Duty to make References**

#### **A. COMPLETED MERGERS**

##### **172. Duty to make references.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> must make a reference to the Competition Commission<sup>2</sup> if the OFT believes that it is or may be the case that: (1) a relevant merger situation<sup>3</sup> has been created<sup>4</sup>; and (2) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom<sup>5</sup> for goods or services<sup>6</sup>.

The OFT may decide not to make a reference if it believes that the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission<sup>7</sup>, or any relevant customer benefits<sup>8</sup> in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned<sup>9</sup>.

No reference is to be made by the OFT if:

- (a) an undertaking or merger notice has been given<sup>10</sup>;
- (b) the OFT is considering whether to accept undertakings<sup>11</sup> instead of making such a reference<sup>12</sup>;
- (c) the relevant merger situation concerned is being, or has been, dealt with in connection with a reference of an anticipated merger<sup>13</sup>;
- (d) an intervention notice<sup>14</sup> is in force in relation to the matter or the matter to which such a notice relates has been finally determined<sup>15</sup>;
- (e) the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others)<sup>16</sup>, is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request<sup>17</sup>; or
- (f) a reasoned submission requesting referral to the European Commission has been submitted<sup>18</sup> to the European Commission<sup>19</sup>.

A reference must, in particular, specify the enactment<sup>20</sup> under which it is made and the date on which it is made<sup>21</sup>. Specific provision is made regarding the primacy of Community law in relation to such references<sup>22</sup>.

1 As to the OFT see PARAS 6-8. As to the power of the Secretary of State to give an intervention notice to the OFT see PARAS 189, 204. As to the Secretary of State see PARA 5.

2 As to the Competition Commission see PARAS 9-12.

3 See PARA 173.

4 The references to the creation of a relevant merger situation are to be construed in accordance with the Enterprise Act 2002 s 23 (see PARA 173): s 22(5).

5 In the Enterprise Act 2002 Pt 3 (ss 22-130), 'market in the United Kingdom' includes: (1) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and (2) any market which operates only in a part of the United Kingdom; and references to a market for goods or services include references to a market for goods and services: ss 22(6), 130. As to the meaning of 'United Kingdom' see PARA 401 note 1. 'Goods' includes buildings and other structures, and also includes ships, aircraft and hovercraft: ss 129(1), 130. 'Supply', in relation to the supply of goods, includes supply by way of sale, lease, hire or hire-purchase, and, in relation to buildings or other structures, includes the construction of them by a person for another person: ss 129(1), 130. References in Pt 3 to the supply of services are to be construed in accordance with s 128; and references in Pt 3 to a market for services and other related expressions are to be construed accordingly: ss 128(1), 130. The supply of services does not include the provision of services under a contract of service or of apprenticeship whether it is express or implied and (if it is express) whether it is oral or in writing: s 128(2). The supply of services includes: (a) performing for gain or reward any activity other than the supply of goods; (b) rendering services to order; (c) the provision of services by making them available to potential users: s 128(3). The supply of services includes making arrangements for the use of computer software or for granting access to data stored in any form which is not readily accessible: s 128(4). The supply of services includes making

arrangements by means of a relevant agreement (within the meaning of the Telecommunications Act 1984 Sch 2 para 29 (see **TELECOMMUNICATIONS** vol 97 (2010) PARA 162)) for sharing the use of telecommunications apparatus: Enterprise Act 2002 s 128(5) (amended by the Communications Act 2003 s 406(1), Sch 17 para 174(1), (3)). The supply of services includes permitting or making arrangements to permit the use of land in such circumstances as the Secretary of State may by order specify: Enterprise Act 2002 s 128(6). In exercise of this power, the Secretary of State has made the Enterprise Act 2002 (Supply of Services) Order 2003, SI 2003/1594.

6 Enterprise Act 2002 s 22(1). The decision of the OFT not to refer a merger can be challenged: see eg Case 1023/4/1/03 *IBA Health Ltd v Office of Fair Trading* [2003] CAT 27, [2004] CompAR 235; on appeal *Office of Fair Trading v IBA Health Ltd* [2004] EWCA Civ 142, [2004] 4 All ER 1103, [2004] All ER (D) 312 (Feb) (a case under the Enterprise Act 2002 s 33 (reference of anticipated mergers (see PARA 182))).

7 Enterprise Act 2002 s 22(2)(a). See eg OFT Press Release 16/08, 4 February 2008.

8 The reference to relevant consumer benefits is to be construed in accordance with the Enterprise Act 2002 s 30 (see PARA 180): s 22(5).

9 Enterprise Act 2002 s 22(2)(b).

10 Enterprise Act 2002 s 22(3)(a) (amended by the Communications Act 2003 s 406(7), Sch 19(1)). For this purpose, an undertaking may be given under the Enterprise Act 2002 s 74(1) (see PARA 218) or Sch 7 para 4 (see PARA 229) and a merger notice may be given under s 96(3) (see PARA 250).

11 Ie under the Enterprise Act 2002 s 73 (see PARA 217).

12 Enterprise Act 2002 s 22(3)(b).

13 Enterprise Act 2002 s 22(3)(c). A reference of anticipated merger is made under s 33 (see PARA 182).

14 Ie a notice under the Enterprise Act 2002 s 42(2) (see PARA 189).

15 Enterprise Act 2002 s 22(3)(d) (amended by SI 2004/1079). A notice under the Enterprise Act 2002 s 42(2) (see PARA 189) is determined under Pt 3 Ch 2 (ss 42-58A) (see PARA 189 et seq) otherwise than in circumstances in which a notice is then given to the OFT under s 56(1) (see PARA 202). The reference to a matter to which a notice under s 42(2) relates being finally determined under Ch 2 is to be construed in accordance with s 43(4), (5) (see PARA 190): s 22(5).

16 Ie under EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 22(1) (see PARA 76).

17 Enterprise Act 2002 s 22(3)(e) (amended by SI 2004/1079).

18 Ie under the EC Merger Regulation art 4(5) (see PARA 76).

19 Enterprise Act 2002 s 22(3)(f) (added by SI 2004/1079). This provision ceases to apply if the OFT is informed that a member state competent to examine the concentration under its national competition law has, within the time permitted by the EC Merger Regulation art 4(5), expressed its disagreement as regards the request to refer the case to the European Commission; and this provision is to be construed in accordance with that Regulation: Enterprise Act 2002 s 22(3A) (added by SI 2004/1079).

20 'Enactment' includes an Act of the Scottish Parliament, Northern Ireland legislation and an enactment comprised in subordinate legislation, and includes an enactment whenever passed or made: Enterprise Act 2002 ss 129(1), 130. 'Subordinate legislation' has the same meaning as in the Interpretation Act 1978 (see **STATUTES** vol 44(1) (Reissue) PARA 1232) and also includes an instrument made under an Act of the Scottish Parliament and an instrument made under Northern Ireland legislation: Enterprise Act 2002 ss 129(1), 130.

21 Enterprise Act 2002 s 22(4).

22 'Community law' means (1) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and (2) all the remedies and procedures from time to time provided for by or under the Community Treaties: Enterprise Act 2002 s 129(1). The duty to make a reference under the Enterprise Act 2002 s 22 applies in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within s 24 (see PARA 174) if the following condition is satisfied: s 122(3). The condition is that, because of the EC Merger Regulation or anything done under or in accordance with it, the reference could not have been made earlier than four months before the date on which it is to be made: see Enterprise Act 2002 s 122(4), (5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/173. Relevant merger situations.

### **173. Relevant merger situations.**

For the purposes of the statutory provisions relating to mergers<sup>1</sup>, a relevant merger situation has been created if two or more enterprises<sup>2</sup> have ceased to be distinct enterprises<sup>3</sup> at a specified time or in specified circumstances<sup>4</sup> and the value of the turnover in the United Kingdom<sup>5</sup> of the enterprise being taken over exceeds £70 million<sup>6</sup>.

A relevant merger situation has also been created if two or more enterprises have ceased to be distinct enterprises at a specified time or in specified circumstances<sup>7</sup> and, as a result, one or both of the following conditions prevails or prevails to a greater extent<sup>8</sup>. The first condition is that, in relation to the supply of goods<sup>9</sup> of any description, at least one-quarter<sup>10</sup> of all the goods of that description which are supplied in the United Kingdom, or in a substantial part of the United Kingdom are supplied by one and the same person or are supplied to one and the same person, or are supplied by the persons by whom the enterprises concerned are carried on, or are supplied to those persons<sup>11</sup>. The second condition is that, in relation to the supply of services of any description, the supply of services of that description in the United Kingdom, or in a substantial part of the United Kingdom, is to the extent of at least one-quarter, supply by one and the same person, or supply for one and the same person or supply by the persons by whom the enterprises concerned are carried on, or supply for those persons<sup>12</sup>.

In relation to the duty to make references<sup>13</sup>, the question whether a relevant merger situation has been created is to be determined immediately before the time when the reference has been, or is to be, made<sup>14</sup>.

1     Ie the Enterprise Act 2002 Pt 3 (ss 22-130).

2     'Enterprise' means the activities, or part of the activities, of a business: Enterprise Act 2002 ss 129(1), 130. 'Business' includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge: ss 129(1), 130. As to the meanings of 'goods', 'supply of goods' and 'supply of services' see PARA 172 note 5. See also note 9.

3     As to enterprises ceasing to be distinct enterprises see PARA 176.

4     Ie time limits and circumstances falling within the Enterprise Act 2002 s 24 (see PARA 174).

5     As to the meaning of 'United Kingdom' see PARA 401 note 1.

6     Enterprise Act 2002 s 23(1). As to the turnover test see PARA 178.

7     Enterprise Act 2002 s 23(2)(a). See note 4.

8     Enterprise Act 2002 s 23(2)(b). The Secretary of State may by order amend or replace the conditions which determine for the purposes of Pt 3 whether a relevant merger situation has been created: s 123(1). As to the Secretary of State see PARA 5. The Secretary of State is not permitted to exercise this power to amend or replace the conditions mentioned in s 23(1) (see the text to notes 1-6) or to amend or replace the condition mentioned in s 23(2)(a) (see the text and note 7): s 123(2). In exercising his power to amend or replace the condition mentioned in s 23(2)(b) or any condition which for the time being applies instead of it, the Secretary of State must, in particular, have regard to the desirability of ensuring that any amended or new condition continues to operate by reference to the degree of commercial strength which results from the enterprises concerned having ceased to be distinct: s 123(3). Before making such an order, the Secretary of State must consult the Office of Fair Trading (the 'OFT') and the Competition Commission: s 123(4). As to the OFT see PARAS 6-8; and as to the Competition Commission see PARAS 9-12. An order may provide for the delegation of functions

to the decision-making authority: s 123(5). 'Decision-making authority' means: (1) in the case of a reference or possible reference under s 22 (see PARA 172) or s 33 (see PARA 182), the OFT or (as the case may be) the Competition Commission; and (2) in the case of a notice or possible notice from the Secretary of State under s 42(2) (see PARA 189) or s 59(2) (see PARA 204) or a reference or possible reference under s 45 (see PARA 193) or s 62 (see PARA 208), the OFT, the Commission or the Secretary of State: s 22(7).

9 References in the Enterprise Act 2002 s 23(3), (4) to the supply of goods or services, in relation to goods or services of any description which are the subject of different forms of supply, are to be construed in whichever of the following ways the decision-making authority considers appropriate: (1) as references to any of those forms of supply taken separately; (2) as references to all those forms of supply taken together; or (3) as references to any of those forms of supply taken in groups: s 23(6). For the purposes of s 23(6), the decision-making authority may treat goods or services as being the subject of different forms of supply whenever: (a) the transactions concerned differ as to their nature, their parties, their terms or their surrounding circumstances; and (b) the difference is one which, in the opinion of the decision-making authority, ought for the purposes of that provision to be treated as a material difference: s 23(7). The criteria for deciding when goods or services can be treated, for these purposes, as goods or services of a separate description are to be such as in any particular case the decision-making authority considers appropriate in the circumstances of that case: s 23(8).

10 For the purpose of deciding whether the proportion of one-quarter mentioned in the Enterprise Act 2002 s 23(3), (4) is fulfilled with respect to goods or services of any description, the decision-making authority must apply such criterion (whether value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or such combination of criteria, as the decision-making authority considers appropriate: s 23(5).

11 Enterprise Act 2002 s 23(3).

12 Enterprise Act 2002 s 23(4). See also note 10.

13 Ie for the purposes of the Enterprise Act 2002 Pt 3 Ch 1 (ss 22-41).

14 Enterprise Act 2002 s 23(9)(b). In the case of a reference which is treated as having been made under s 22 (see PARA 172) by virtue of s 37(2) (see PARA 185), the question whether a relevant merger situation has been created is to be determined as at such time as the Competition Commission may determine: s 23(9)(a).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/174. Time limits and prior notice.

#### **174. Time limits and prior notice.**

For the purpose of deciding on relevant merger situations<sup>1</sup>, two or more enterprises have ceased to be distinct enterprises<sup>2</sup> at a time or in circumstances falling within the following provisions if the two or more enterprises ceased to be distinct enterprises before the day on which the reference relating to them is to be made and did so not more than four months before that day<sup>3</sup>. They also cease to be distinct enterprises if notice<sup>4</sup> of material facts about the arrangements or transactions under or in consequence of which the enterprises have ceased to be distinct enterprises has not been given correctly<sup>5</sup>. Notice of material facts is given correctly if: (1) it is given to the Office of Fair Trading (the 'OFT')<sup>6</sup> prior to the entering into of the arrangements or transactions concerned or the facts are made public<sup>7</sup> prior to the entering into of those arrangements or transactions; or (2) it is given to the OFT, or the facts are made public, more than four months before the day on which the reference is to be made<sup>8</sup>.

1 Ie for the purposes of the Enterprise Act 2002 s 23 (see PARA 173).

2 As to the meaning of 'enterprise' see PARA 173 note 2. As to enterprises ceasing to be distinct see PARA 176.

3 Enterprise Act 2002 s 24(1)(a). As to the extension of time limits see PARA 175.

- 4 For this purpose, 'notice' includes notice which is not in writing: Enterprise Act 2002 s 24(3).
- 5 Enterprise Act 2002 s 24(1)(b).
- 6 As to the OFT see PARAS 6-8.
- 7 'Made public' means so publicised as to be generally known or readily ascertainable: Enterprise Act 2002 s 24(3).
- 8 Enterprise Act 2002 s 24(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/175. Extension of time limits.

### **175. Extension of time limits.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> and the persons carrying on the enterprises which have or may have ceased to be distinct enterprises<sup>2</sup> may agree to extend by no more than 20 days the four month time limit for determining the matter<sup>3</sup>.

The OFT may by notice<sup>4</sup> to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period<sup>5</sup> if it considers that any of those persons has failed to provide, within the period stated in a notice<sup>6</sup> and in the manner authorised or required, information requested of him in that notice<sup>7</sup>. Such an extension is for the period beginning with the end of the period within which the information is to be provided and which is stated in the notice<sup>8</sup> and ending with the provision of the information to the satisfaction of the OFT or, if earlier, the cancellation by the OFT of the extension<sup>9</sup>.

The OFT may by notice to the persons carrying on the enterprises which have or may have ceased to be distinct enterprises extend the four month period if it is seeking undertakings from any of those persons<sup>10</sup>. The OFT may also by notice to such persons extend the four month period if the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom<sup>11</sup>, whether alone or with others, for referral to the Commission<sup>12</sup>, but is not yet proceeding with the matter in pursuance of such a request<sup>13</sup>.

Where the four month period is extended or further extended by virtue of the provisions set out above in relation to a particular case, any reference to that period<sup>14</sup> has effect in relation to that case as if it were a reference to a period equivalent to the aggregate of the period being extended and the period of the extension, whether or not those periods overlap in time<sup>15</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the meaning of 'enterprise' see PARA 173 note 2. As to enterprises ceasing to be distinct see PARA 176. The Secretary of State may make regulations for the purposes of the Enterprise Act 2002 s 25: s 32(1). At the date at which this volume states the law no such regulations had been made. Regulations may provide that a person is, or is not, to be treated, in such circumstances as may be specified in the regulations, as acting on behalf of a person carrying on an enterprise which has or may have ceased to be a distinct enterprise: s 32(1), (2)(e).

3 Enterprise Act 2002 s 25(1). The four month time limit is that mentioned in s 24(1)(a) or s 24(2)(b) (see PARA 174). No more than one extension is possible under s 25(1): s 25(12).

In determining for the purposes of s 25(1), (5)(b) (see note 10 head (2)), s 32(3) (see note 7) any period which is expressed in the enactment concerned as a period of days or number of days no account is to be taken of



Saturday, Sunday, Good Friday and Christmas Day and any day which is a bank holiday in England and Wales: s 32(4).

4 'Notice' means notice in writing: Enterprise Act 2002 ss 129(1), 130.

5 See note 3.

6 Ie a notice under the Enterprise Act 2002 s 31 (see PARA 181).

7 Enterprise Act 2002 s 25(2). A notice under s 25(2) must be given within five days of the end of the period within which the information is to be provided and which is stated in the notice under s 31 (see PARA 181) and must inform the person to whom it is addressed of the OFT's opinion as mentioned in s 25(2) and the OFT's intention to extend the period for considering whether to make a reference: s 32(3).

8 See note 6.

9 Enterprise Act 2002 s 25(3). Regulations may: (1) provide for the manner in which any information requested by the OFT under s 31 (see PARA 181) is authorised or required to be provided, and the time at which such information is to be treated as provided (including the time at which it is to be treated as provided to the satisfaction of the OFT for the purposes of s 25(3)); (2) provide for the persons carrying on the enterprises which have or may have ceased to be distinct enterprises to be informed, in circumstances in which s 25(3) applies (a) of the fact that the OFT is satisfied as to the provision of the information requested by it or (as the case may be) of the OFT's decision to cancel the extension; and (b) of the time at which the OFT is to be treated as so satisfied or (as the case may be) of the time at which the cancellation is to be treated as having effect: s 32(1), (2)(b).

10 Enterprise Act 2002 s 25(4). Undertakings in lieu of references are sought under s 73 (see PARA 217). An extension under s 25(4) is for the period beginning with the receipt of the notice under that provision and ending with the earliest of the following events: (1) the giving of the undertakings concerned; (2) the expiry of the period of ten days beginning with the first day after the receipt by the OFT of a notice from the person who has been given a notice under s 25(4) and from whom the undertakings are being sought stating that he does not intend to give the undertakings; or (3) the cancellation by the OFT of the extension: s 25(5). See note 3. Regulations may provide for the persons carrying on the enterprises which have or may have ceased to be distinct enterprises to be informed, in circumstances in which s 25(5) applies, of the OFT's decision to cancel the extension and of the time at which the cancellation is to be treated as having effect: s 32(1), (2)(c). Regulations may also provide for the time at which any notice under s 25(4), (5)(b) (see head (2)), (6) or (8) (see note 13) is to be treated as received: s 32(1), (2)(d).

11 As to the meaning of 'United Kingdom' see PARA 401 note 1.

12 Ie under EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') (see PARA 74).

13 Enterprise Act 2002 s 25(6) (amended by SI 2004/1079). An extension under the Enterprise Act 2002 s 25(6) is for the period beginning with the receipt of the notice under that provision and ending with the receipt of a notice given by the OFT to inform the persons carrying on the enterprises which have or may have ceased to be distinct enterprises of the completion by the European Commission of its consideration of the request of the United Kingdom: s 25(7), (8).

14 Ie in the Enterprise Act 2002 s 24 (see PARA 174) or s 25(1)-(8) (see the text and notes 1-13).

15 Enterprise Act 2002 s 25(9). However, where: (1) the four month period is further extended; (2) the further extension and at least one previous extension is made under one or more of s 25(2), (4) and (6); and (3) the same days or fractions of days are included in or comprise the further extension and are included in or comprise at least one such previous extension then, in calculating the period of the further extension, any days or fractions of days of the kind mentioned in head (3) are to be disregarded: s 25(10), (11).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/176. Enterprises ceasing to be distinct enterprises.

## **176. Enterprises ceasing to be distinct enterprises.**

For the purposes of deciding on relevant merger situations<sup>1</sup>, any two enterprises cease to be distinct enterprises<sup>2</sup> if they are brought under common ownership or common control, whether or not the business to which either of them formerly belonged continues to be carried on under the same or different ownership or control<sup>3</sup>.

Enterprises are, in particular, treated as being under common control if they are: (1) enterprises of interconnected bodies corporate; (2) enterprises carried on by two or more bodies corporate of which one and the same person or group of persons has control; or (3) an enterprise carried on by a body corporate and an enterprise carried on by a person or group of persons having control of that body corporate<sup>4</sup>.

A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate, or the policy of any person in carrying on an enterprise but without having a controlling interest in that body corporate or in that enterprise, may, for these purposes, be treated as having control of it<sup>5</sup>. Associated persons<sup>6</sup>, and any bodies corporate<sup>7</sup> which they or any of them control, are to be treated as one person for the purpose of deciding whether any two enterprises have been brought under common ownership or common control<sup>8</sup>.

1       le for the purposes of the Enterprise Act 2002 s 23 (see PARA 173).

2       As to the meaning of 'enterprise' see PARA 173 note 2. As to when enterprises cease to be distinct see PARA 177.

3       Enterprise Act 2002 s 26(1). For the purposes of s 26(1), in so far as it relates to bringing two or more enterprises under common control, a person or group of persons may be treated as bringing an enterprise under his or their control if: (1) being already able to control or materially to influence the policy of the person carrying on the enterprise, that person or group of persons acquires a controlling interest in the enterprise or, in the case of an enterprise carried on by a body corporate, acquires a controlling interest in that body corporate; or (2) being already able materially to influence the policy of the person carrying on the enterprise, that person or group of persons becomes able to control that policy: s 26(4).

4       Enterprise Act 2002 s 26(2).

5       Enterprise Act 2002 s 26(3).

6       For this purpose: (1) any individual and that individual's spouse, civil partner or partner and any relative, or spouse, civil partner or partner of a relative, of that individual or of that individual's spouse, civil partner or partner; (2) any person in his capacity as trustee of a settlement and the settlor or grantor and any person associated with the settlor or grantor; (3) persons carrying on business in partnership and the spouse, civil partner or partner and relatives of any of them; or (4) two or more persons acting together to secure or exercise control of a body of persons corporate or unincorporate or to secure control of any enterprise or assets, are to be regarded as associated with one another: Enterprise Act 2002 s 127(4) (amended by the Civil Partnership Act 2004 s 261(1), Sch 27 para 168). 'Relative' means a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or descendant (the stepchild of any person, or anyone adopted by a person, whether legally or otherwise, as his child being regarded as a relative or taken into account to trace a relationship in the same way as that person's child); and references to a spouse, civil partner or partner includes a former spouse, civil partner or partner: Enterprise Act 2002 s 127(6) (amended by the Civil Partnership Act 2004 Sch 27 para 168).

A reference under the Enterprise Act 2002 s 22 (see PARA 172), s 33 (see PARA 182), s 45 (see PARA 193) or s 62 (see PARA 208) (whether or not made by virtue of s 127) may be framed so as to exclude from consideration, either altogether or for a specified purpose or to a specified extent, any matter which would otherwise not have been taken into account on that reference: s 127(3).

7       The reference in the text to bodies corporate which associated persons control is to be construed in accordance with the Enterprise Act 2002 s 26(3), (4) (see the text and notes 3, 5): s 127(5).

8       Enterprise Act 2002 s 127(1)(a). This does not exclude from s 26 (see the text and notes 1-5) any case which would otherwise fall within that provision: s 127(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/177. Time when enterprises cease to be distinct.

### **177. Time when enterprises cease to be distinct.**

In relation to any arrangements or transaction not having immediate effect or having immediate effect only in part but under or in consequence of which any two enterprises cease to be distinct enterprises<sup>1</sup>, the time when the parties to any such arrangements or transaction become bound to such extent as will result, on effect being given to their obligations, in the enterprises ceasing to be distinct enterprises is taken to be the time at which the two enterprises cease to be distinct enterprises<sup>2</sup>. Accordingly, no account is to be taken of any option or other conditional right until the option is exercised or the condition is satisfied<sup>3</sup>.

Where there are successive events: (1) which occur within a period of two years under or in consequence of the same arrangements or transaction, or successive arrangements or transactions between the same parties or interests; and (2) by virtue of each of which, under or in consequence of the arrangements or the transaction or transactions concerned, any enterprises cease as between themselves to be distinct enterprises<sup>4</sup>, the decision-making authority<sup>5</sup> may, for the purposes of a reference, treat the successive events as having occurred simultaneously on the date on which the latest of them occurred<sup>6</sup>. The decision-making authority may treat such arrangements or transactions as the decision-making authority considers appropriate as arrangements or transactions between the same interests<sup>7</sup>.

<sup>1</sup> As to the meaning of 'enterprise' see PARA 173 note 2. As to enterprises ceasing to be distinct see PARA 176.

<sup>2</sup> Enterprise Act 2002 s 27(1), (2). The provisions of s 27(1)-(3) are subject to s 27(5)-(8) (see the text and notes 4-7) and s 29 (see PARA 179); s 27(4).

<sup>3</sup> See the Enterprise Act 2002 s 27(3). See note 2.

<sup>4</sup> Enterprise Act 2002 s 27(6).

<sup>5</sup> As to the meaning of 'decision-making authority' see PARA 173 note 8.

<sup>6</sup> Enterprise Act 2002 s 27(5).

<sup>7</sup> Enterprise Act 2002 s 27(7). In deciding whether it is appropriate to treat arrangements or transactions as arrangements or transactions between the same interests the decision-making authority must, in particular, have regard to the persons substantially concerned in the arrangements or transactions concerned: s 27(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/178. Turnover test.

### **178. Turnover test.**

For the purposes of determining relevant merger situations<sup>1</sup> the value of the turnover in the United Kingdom<sup>2</sup> of the enterprise<sup>3</sup> being taken over is to be determined by taking the total value of the turnover in the United Kingdom of the enterprises which cease to be distinct enterprises<sup>4</sup> and deducting: (1) the turnover in the United Kingdom of any enterprise which continues to be carried on under the same ownership and control; or (2) if no enterprise

continues to be carried on under the same ownership and control, the turnover in the United Kingdom which, of all the turnovers concerned, is the turnover of the highest value<sup>5</sup>.

The turnover in the United Kingdom of an enterprise is to be determined in accordance with such provisions as may be specified in an order made by the Secretary of State<sup>6</sup>. An order may, in particular, make provision as to: (a) the amounts which are, or which are not, to be treated as comprising an enterprise's turnover; (b) the date or dates by reference to which an enterprise's turnover is to be determined; (c) the connection with the United Kingdom by virtue of which an enterprise's turnover is turnover in the United Kingdom<sup>7</sup>. An order may, in particular, make provision enabling the decision-making authority<sup>8</sup> to determine matters of a description specified in the order<sup>9</sup>.

The Office of Fair Trading (the 'OFT')<sup>10</sup> must keep under review the sum set<sup>11</sup> for the value of turnover and from time to time advise the Secretary of State as to whether the sum is still appropriate<sup>12</sup>. The Secretary of State may by order alter the sum<sup>13</sup>.

1     Ie for the purposes of the Enterprise Act 2002 s 23 (see PARA 173).

2     As to the meaning of 'United Kingdom' see PARA 401 note 1.

3     As to the meaning of 'enterprise' see PARA 173 note 2.

4     As to enterprises ceasing to be distinct see PARA 176.

5     Enterprise Act 2002 s 28(1).

6     Enterprise Act 2002 s 28(2). This determination applies for the purposes of Pt 3 (ss 22-130) (other than s 121(4)(c)(ii) (see PARA 272)). As to the Secretary of State see PARA 5.

7     Enterprise Act 2002 s 28(3). See the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370, art 11 (amended by SI 2004/3204).

8     As to the meaning of 'decision-making authority' see PARA 173 note 8.

9     Enterprise Act 2002 s 28(4). This may include any of the matters mentioned in heads (a)-(c) in the text: s 28(4).

10    As to the OFT see PARAS 6-8.

11    Ie the sum mentioned in the Enterprise Act 2002 s 23(1)(b) (see PARA 173).

12    Enterprise Act 2002 s 28(5).

13    Enterprise Act 2002 s 28(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/179. Obtaining control by stages.

### **179. Obtaining control by stages.**

Where an enterprise<sup>1</sup> is brought under the control<sup>2</sup> of a person or group of persons in the course of a series of two or more transactions which (1) enable that person or group of persons directly or indirectly to control or materially to influence the policy of any person carrying on the enterprise or to do so to a greater degree or is a direct or indirect step towards doing so<sup>3</sup>; or (2) by virtue of which that person or group of persons acquires a controlling interest in the enterprise or, where the enterprise is carried on by a body corporate, in that body corporate<sup>4</sup>,

then those transactions may, if the decision-making authority<sup>5</sup> considers it appropriate, be treated for the purposes of a reference as having occurred simultaneously on the date on which the latest of them occurred<sup>6</sup>.

Where the period within which a series of transactions occurs exceeds two years, the transactions that may be treated as having occurred simultaneously are any of those transactions that occur within a period of two years<sup>7</sup>. In determining the time at which any transaction occurs, no account is to be taken of any option or other conditional right until the option is exercised or the condition is satisfied<sup>8</sup>.

1 As to the meaning of 'enterprise' see PARA 173 note 2.

2 The provisions of the Enterprise Act 2002 s 26(2)-(4) and s 127(1), (2), (4)-(6) (see PARA 176) apply for these purposes to determine: (1) whether an enterprise is brought under the control of a person or group of persons; and (2) whether a transaction is one to which s 29(2) applies (see the text and notes 4-6), as they apply for the purposes of s 26 to determine whether enterprises are brought under common control: s 29(5).

3 Enterprise Act 2002 s 29(2)(a).

4 Enterprise Act 2002 s 29(2)(b). Where a series of transactions includes a transaction falling within s 29(2)(b), any transaction occurring after the occurrence of that transaction is to be disregarded for the purposes of s 29(1): s 29(3).

5 As to the meaning of 'decision-making authority' see PARA 173 note 8.

6 Enterprise Act 2002 s 29(1), (2).

7 Enterprise Act 2002 s 29(4).

8 Enterprise Act 2002 s 29(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/180. Relevant customer benefits.

## **180. Relevant customer benefits.**

For the purposes of the provisions relating to the referral of mergers<sup>1</sup>, a benefit is a relevant customer benefit if it is a benefit to relevant customers<sup>2</sup> in the form of lower prices, higher quality or greater choice of goods<sup>3</sup> or services in any market in the United Kingdom<sup>4</sup>, whether or not the market or markets in which the substantial lessening of competition concerned has, or may have, occurred or, as the case may be, may occur<sup>5</sup>, or in the form of greater innovation in relation to such goods or services<sup>6</sup>. In addition, it is necessary that the decision-making authority<sup>7</sup> believes either: (1) the benefit has accrued as a result of the creation of the relevant merger situation concerned or may be expected to accrue within a reasonable period as a result of the creation of that situation and the benefit was, or is, unlikely to accrue without the creation of that situation or a similar lessening of competition<sup>8</sup>; or (2) that the benefit may be expected to accrue within a reasonable period as a result of the creation of the relevant merger situation concerned and the benefit is unlikely to accrue without the creation of that situation or a similar lessening of competition<sup>9</sup>.

1 Ie for the purposes of the Enterprise Act 2002 Pt 3 (ss 22-130) (see PARAS 172-179, 181 et seq).

2 'Relevant customers' means: (1) customers of any person carrying on an enterprise which, in the creation of the relevant merger situation concerned, has ceased to be, or (as the case may be) will cease to be,

a distinct enterprise; (2) customers of such customers; and (3) any other customers in a chain of customers beginning with the customers mentioned in head (1); and 'customers' includes future customers: Enterprise Act 2002 s 30(4). As to the meaning of 'enterprise' see PARA 173 note 2. As to enterprises ceasing to be distinct see PARA 176. 'Customer' includes a customer who is not a consumer: ss 129(1), 130. 'Consumer' means any person who is: (a) a person to whom goods are or are sought to be supplied (whether by way of sale or otherwise) in the course of a business carried on by the person supplying or seeking to supply them; or (b) a person for whom services are or are sought to be supplied in the course of a business carried on by the person supplying or seeking to supply them; and who does not receive or seek to receive the goods or services in the course of a business carried on by him: ss 129(1), 130.

3 As to the meaning of 'goods' see PARA 172 note 5.

4 As to the meaning of 'market in the United Kingdom' see PARA 172 note 5. As to the meaning of 'United Kingdom' see PARA 401 note 1.

5 Enterprise Act 2002 s 30(1)(a).

6 Enterprise Act 2002 s 30(1)(b).

7 As to the meaning of 'decision-making authority' see PARA 173 note 8.

8 Enterprise Act 2002 s 30(1)(b)(i), (2). The decision-making authority must hold this belief in the case of a reference or possible reference under s 22 (see PARA 172) or s 45(2) (see PARA 193).

9 Enterprise Act 2002 s 30(1)(b)(ii), (3). The decision-making authority must hold this belief in the case of a reference or possible reference under s 33 (see PARA 182) or s 45(4) (see PARA 193).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/A. COMPLETED MERGERS/181. Information powers in relation to completed mergers.

### **181. Information powers in relation to completed mergers.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may by notice<sup>2</sup> to any of the persons carrying on the enterprises<sup>3</sup> which have or may have ceased to be distinct enterprises<sup>4</sup> request him to provide the OFT with such information as the OFT may require for the purpose of deciding whether to make a reference to the Competition Commission<sup>5</sup>. The notice must state the information required, the period within which the information is to be provided and the possible consequences of not providing the information within the stated period and in the authorised or required manner<sup>6</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the meaning of 'notice' see PARA 175 note 4.

3 As to the meaning of 'enterprise' see PARA 173 note 2.

4 As to enterprises ceasing to be distinct see PARA 176.

5 Enterprise Act 2002 s 31(1). A reference is made under s 22 (see PARA 172). As to the Competition Commission see PARAS 9-12. The Secretary of State may make regulations for the purposes of s 31: see s 32(1); and PARA 175. At the date at which this volume states the law no such regulations had been made.

6 Enterprise Act 2002 s 31(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/B. ANTICIPATED MERGERS/182. Duty to make references.

## **B. ANTICIPATED MERGERS**

### **182. Duty to make references.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> must make a reference to the Competition Commission<sup>2</sup> if the OFT believes that it is or may be the case that: (1) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>3</sup>; and (2) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom<sup>4</sup> for goods<sup>5</sup> or services<sup>6</sup>. However, the OFT may decide not to make a reference if it believes that the market concerned is not, or the markets concerned are not, of sufficient importance to justify the making of a reference to the Commission<sup>7</sup>, the arrangements concerned are not sufficiently far advanced, or are not sufficiently likely to proceed, to justify the making of a reference to the Commission<sup>8</sup> or any relevant customer benefits<sup>9</sup> in relation to the creation of the relevant merger situation<sup>10</sup> concerned outweigh the substantial lessening of competition concerned and any adverse effects of the substantial lessening of competition concerned<sup>11</sup>. In addition, a reference may be prohibited by statute<sup>12</sup>.

A reference must, in particular, specify the enactment under which it is made and the date on which it is made<sup>13</sup>.

The Secretary of State<sup>14</sup> may make further provision by order in relation to arrangements which are in progress or contemplation<sup>15</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Competition Commission see PARAS 9-12.

3 Enterprise Act 2002 s 33(1)(a). As to the meaning of 'relevant merger situation' see PARA 173.

4 As to the meaning of 'market in the United Kingdom' see PARA 172 note 5. As to the meaning of 'United Kingdom' see PARA 401 note 1.

5 As to the meaning of 'goods' see PARA 172 note 5.

6 Enterprise Act 2002 s 33(1)(b).

7 Enterprise Act 2002 s 33(2)(a).

8 Enterprise Act 2002 s 33(2)(b).

9 As to the meaning of 'relevant customer benefits' see PARA 180.

10 As to the meaning of 'relevant merger situation' see PARA 173.

11 Enterprise Act 2002 s 33(2)(c).

12 See the Enterprise Act 2002 s 33(3) (amended by the Communications Act 2003 s 406(7), Sch 19(1); and SI 2004/1079), which provides that no reference may be made if:

(1) the making of the reference is prevented by the Enterprise Act 2002 s 74(1) (see PARA 218) or s 96(3) (see PARA 250) or Sch 7 para 4 (see PARA 229);

(2) the OFT is considering whether to accept undertakings under s 73 (see PARA 217) instead of making such a reference;

(3) the arrangements concerned are being, or have been, dealt with in connection with a reference made under s 22 (see PARA 172);

(4) an intervention notice under s 42(2) (see PARA 189) is in force in relation to the matter or the matter to which such a notice relates has been finally determined under the provisions relating to public interest cases (ie Pt 3 Ch 2 (ss 42-58A)) otherwise than in circumstances in which a notice is then given to the OFT under s 56(1) (see PARA 202);

(5) the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) under EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 22(1) (see PARA 74), is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request; or

(6) a reasoned submission requesting referral to the European Commission has been submitted to the European Commission under the EC Merger Regulation art 4(5).

Head (6) ceases to apply if the OFT is informed that a member state competent to examine the concentration under its national competition law has, within the time permitted by the EC Merger Regulation art 4(5), expressed its disagreement as regards the request to refer the case to the European Commission; and this provision is to be construed in accordance with that Regulation: Enterprise Act 2002 s 33(3A) (added by SI 2004/1079).

13 Enterprise Act 2002 s 33(4).

14 As to the Secretary of State see PARA 5.

15 See the Enterprise Act 2002 s 34. The Secretary of State may by order make such provision as he considers appropriate about the operation of s 27 (see PARA 177) and s 29 (see PARA 179) in relation to references under Pt 3 (ss 22-130) which relate to arrangements which are in progress or in contemplation or in relation to notices under s 42(2) (see PARA 189), s 59(2) (see PARA 204) or s 67(2) (see PARA 213) which relate to such arrangements: s 34(1). Such an order may, in particular, provide for s 27(5)-(8) (see PARA 177) and s 29 (see PARA 179) to apply with modifications in relation to such references or notices or in relation to particular descriptions of such references or notices: s 34(2)(a). Such an order may also enable particular descriptions of events, arrangements or transactions which have already occurred: (1) to be taken into account for the purposes of deciding whether to make such references or such references of a particular description or whether to give such notices or such notices of a particular description; (2) to be dealt with under such references or such references of a particular description or under such notices or such notices of a particular description: s 34(2)(b).

In exercise of this power, the Secretary of State has made the Enterprise Act 2002 (Anticipated Mergers) Order 2003, SI 2003/1595.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/C. CASES REFERRED BY THE EUROPEAN COMMISSION/183. Duty of the Office of Fair Trading where case referred by the European Commission.

### ***C. CASES REFERRED BY THE EUROPEAN COMMISSION***

#### **183. Duty of the Office of Fair Trading where case referred by the European Commission.**

If the European Commission has by a decision referred the whole or part of a case to the Office of Fair Trading (the 'OFT')<sup>1</sup>, or is deemed to have taken such a decision, unless an intervention notice<sup>2</sup> is in force in relation to that case<sup>3</sup>, then before the end of the preliminary assessment period<sup>4</sup>, the OFT must decide whether to make a reference to the Commission<sup>5</sup> and must inform the persons carrying on the enterprises<sup>6</sup> concerned by notice<sup>7</sup> of that decision and of the reasons for it<sup>8</sup>.



The OFT may by notice<sup>9</sup> to any of the persons carrying on the enterprises concerned request him to provide the OFT with such information as the OFT may require for the purpose of making a decision<sup>10</sup>.

The OFT may decide not to make a reference on the basis that it is considering whether to seek or accept undertakings<sup>11</sup> instead of making a reference, but a decision taken on that basis does not prevent the OFT from making a reference in the event of no such undertakings being offered or accepted<sup>12</sup>.

If the OFT has imposed a requirement to provide information<sup>13</sup> and it considers that the person on whom that requirement was imposed has failed to comply with it, the OFT may, by notice to the persons carrying on the enterprises concerned, extend the preliminary assessment period<sup>14</sup>.

1       Ie under EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 4(4) or art 9 (see PARA 74). As to the OFT see PARAS 6-8.

2       As to intervention notices see PARA 189.

3       Enterprise Act 2002 s 34A(1) (ss 34A, 34B added by SI 2004/1079).

4       'Preliminary assessment period' means the period of 45 working days beginning with the day after the day on which the decision of the European Commission to refer the case is taken (or is deemed to have been taken): Enterprise Act 2002 s 34A(4) (as added: see note 3). 'Working day' means any day which is not a Saturday, a Sunday or a day which is a European Commission holiday (as published in the Official Journal of the European Communities before the beginning of the year in which it occurs): Enterprise Act 2002 s 34A(4) (as so added).

5       Enterprise Act 2002 s 34A(2)(a) (as added: see note 3). A reference is made to the Commission under s 22 (see PARA 172) or s 33 (see PARA 182).

6       As to the meaning of 'enterprise' see PARA 173 note 2.

7       As to the meaning of 'notice' see PARA 175 note 4.

8       Enterprise Act 2002 s 34A(2)(b) (as added: see note 3).

9       The notice must state: (1) the information required; (2) the period within which the information is to be provided; (3) the manner (if any) in which the information is required to be provided; and (4) the possible consequences (a) of not providing the information within the stated period; and (b) if a manner for its provision is stated in the notice, of not providing it in that manner: Enterprise Act 2002 s 34B(2) (as added: see note 3).

10       Enterprise Act 2002 s 34B(1) (as added: see note 3).

11       Ie under the Enterprise Act 2002 s 73 (see PARA 217).

12       Enterprise Act 2002 s 34A(3) (as added: see note 3).

13       Ie under the Enterprise Act 2002 s 34B (see the text and notes 9-10).

14       Enterprise Act 2002 s 34A(5) (as added: see note 3). The period of an extension under s 34A(5): (1) begins with the end of the period within which the requirement under s 34B could be complied with (see the text and notes 9-10); and (2) ends with the earlier of either compliance with the requirement to the satisfaction of the OFT or cancellation by the OFT of the extension: s 34A(6) (as added: see note 3). A notice under s 34A(6) must be given within five working days of the end of the period mentioned in head (1), and must inform the person to whom it is addressed that the OFT is of the opinion that the requirement to provide information has not been complied with and that it intends to extend the preliminary assessment period: s 34A(7) (as added: see note 3).

## ***D. DETERMINATION OF REFERENCES***

### **184. Questions to be decided in relation to completed and anticipated mergers.**

The Competition Commission<sup>1</sup>, on a reference in relation to a completed merger or an anticipated merger<sup>2</sup>, must decide whether a relevant merger situation<sup>3</sup> has been created, or (in relation to an anticipated merger) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and, if so, whether the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom<sup>4</sup> for goods or services<sup>5</sup>.

The Commission may decide if there is an anti-competitive outcome in relation to a merger. There is an anti-competitive outcome if: (1) a relevant merger situation has been created and the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services<sup>6</sup>; or (2) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation and the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services<sup>7</sup>.

If the Commission has decided on a reference that there is an anti-competitive outcome, it must decide the following additional questions<sup>8</sup>:

- (a) whether action<sup>9</sup> should be taken by it<sup>10</sup> for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition<sup>11</sup>;
- (b) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition<sup>12</sup>; and
- (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented<sup>13</sup>.

In deciding these questions the Commission must, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it<sup>14</sup>. The Commission may, in particular, have regard to the effect of any action on any relevant customer benefits<sup>15</sup> in relation to the creation of the relevant merger situation concerned<sup>16</sup>.

1 As to the Competition Commission see PARAS 9-12. As to decisions of the Commission under the Enterprise Act 2002 ss 35(1), 36(1) see PARA 11 note 13.

2 A completed merger is referred under the Enterprise Act 2002 s 22 (see PARA 172) and an anticipated merger under s 33 (see PARA 182). In relation to the question whether a relevant merger situation has been created, a reference under s 22 or s 33 may be framed so as to require the Commission to exclude from consideration s 23(1) or s 23(2) (see PARA 173) or one of those provisions if the Commission finds that the other is satisfied: ss 35(6), 36(5). In relation to the question whether any such result as is mentioned in s 23(2)(b) has arisen (see PARA 173), a reference under s 22 or s 33 may be framed so as to require the Commission to confine its investigation to the supply of goods or services in a part of the United Kingdom specified in the reference: ss 35(7), 36(6). As to the meanings of 'goods' and 'supply of services' see PARA 172 note 5. As to the meaning of 'United Kingdom' see PARA 401 note 1.

3 As to the meaning of 'relevant merger situation' see PARA 173.

- 4 As to the meaning of 'market in the United Kingdom' see PARA 172 note 5.
- 5 Enterprise Act 2002 ss 35(1), 36(1), which are expressed to be subject to ss 35(6), (7), 36(5), (6) (see note 2) and s 127(3) (see PARA 176). As to the meaning of 'market for goods or services' see PARA 172 note 5.
- 6 Enterprise Act 2002 s 35(2)(a).
- 7 Enterprise Act 2002 s 35(2)(b).
- 8 Enterprise Act 2002 ss 35(3), 36(2).
- 9 'Action' includes omission; and references to the taking of action include references to refraining from action: Enterprise Act 2002 ss 129(1), 130.
- 10 le under the Enterprise Act 2002 s 41(2) (see PARA 188).
- 11 Enterprise Act 2002 ss 35(3)(a), 36(2)(a).
- 12 Enterprise Act 2002 ss 35(3)(b), 36(2)(b).
- 13 Enterprise Act 2002 ss 35(3)(c), 36(2)(c).
- 14 Enterprise Act 2002 ss 35(4), 36(3).
- 15 As to the meaning of 'relevant customer benefit' see PARA 180.
- 16 Enterprise Act 2002 ss 35(5), 36(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/D. DETERMINATION OF REFERENCES/185. Cancellation and variation of references.

### **185. Cancellation and variation of references.**

The Competition Commission<sup>1</sup> must cancel a reference of an anticipated merger<sup>2</sup> if it considers that the proposal to make arrangements of the kind mentioned in the reference has been abandoned<sup>3</sup>.

The Commission may, if it considers that doing so is justified by the facts (including events occurring on or after the making of the reference concerned), treat a reference of a completed merger as if it had been a reference of an anticipated merger and vice versa<sup>4</sup>. Where the Commission treats a reference in this way, any interim undertaking<sup>5</sup> or interim order<sup>6</sup> which is in force, continues in force as if it had been made in relation to the reference as so treated and the undertaking or order concerned may be varied, superseded, released or revoked accordingly<sup>7</sup>.

The OFT may at any time vary a reference after consulting the Commission<sup>8</sup>. However, no variation by the OFT is capable of altering the period within which the report of the Commission<sup>9</sup> is to be prepared and published<sup>10</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 le a reference under the Enterprise Act 2002 s 33 (see PARA 182).
- 3 Enterprise Act 2002 s 37(1).

4 See the Enterprise Act 2002 s 37(2). This allows the Commission to treat a reference made under s 22 (see PARA 172) or s 33 (see PARA 182) as if it had been made under s 33 or (as the case may be) s 22; and, in such cases, references in Pt 3 (ss 22-130) to references under those provisions, so far as may be necessary, must be construed accordingly: s 37(2). Where, by virtue of s 37(2), the Commission treats a reference made under s 22 or s 33 as if it had been made under s 33 or (as the case may be) s 22, ss 77-81 (interim restrictions and powers: see PARAS 221-224), in particular, apply as if the reference had been made under s 33 or (as the case may be) s 22 instead of under s 22 or s 33: s 37(3).

5 Ie an undertaking accepted under the Enterprise Act 2002 s 80 (see PARA 223).

6 Ie an order made under the Enterprise Act 2002 s 81 (see PARA 224).

7 Enterprise Act 2002 s 37(4), (5).

8 Enterprise Act 2002 s 37(6), (7). The Commission need not be consulted if it has requested the variation concerned: s 37(8).

9 Ie the report of the Commission under the Enterprise Act 2002 s 38 (see PARA 186).

10 Enterprise Act 2002 s 37(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/D. DETERMINATION OF REFERENCES/186. Investigations and reports on references.

## **186. Investigations and reports on references.**

The Competition Commission<sup>1</sup> must prepare and publish<sup>2</sup> a report on a reference in relation to a merger or an anticipated merger<sup>3</sup> within 24 weeks beginning with the date of the reference concerned<sup>4</sup>.

The report, in particular, must contain: (1) the decisions of the Commission on the questions which it is required to answer<sup>5</sup>; (2) its reasons for its decisions<sup>6</sup>; and (3) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions<sup>7</sup>.

The Commission must carry out such investigations as it considers appropriate for the purposes of preparing the report<sup>8</sup>. At the same time as a report is published, the Commission must give it to the Office of Fair Trading (the 'OFT')<sup>9</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 Any duty to publish which is imposed on a person by the Enterprise Act 2002 Pt 3 (ss 22-130), unless the context otherwise requires, is to be construed as a duty on that person to publish in such manner as he considers appropriate for the purpose of bringing the matter concerned to the attention of those likely to be affected by it: s 129(4).

3 Ie a reference under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

4 Enterprise Act 2002 ss 38(1), 39(1). As to the extension of the period see PARA 187.

5 Enterprise Act 2002 s 38(2)(a). The Commission is required to answer questions by virtue of s 35 or s 36 (see PARA 184).

6 Enterprise Act 2002 s 38(2)(b).

7 Enterprise Act 2002 s 38(2)(c).

8 Enterprise Act 2002 s 38(3).

9 Enterprise Act 2002 s 38(4). As to the OFT see PARAS 6-8.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/D. DETERMINATION OF REFERENCES/187. Time limits for investigations and reports.

### **187. Time limits for investigations and reports.**

The Competition Commission<sup>1</sup> must prepare and publish its report on a merger reference<sup>2</sup> within the period of 24 weeks beginning with the date of the reference concerned<sup>3</sup>. The Commission may extend, by no more than eight weeks, the period within which a report is to be prepared and published if it considers that there are special reasons why the report cannot be prepared and published within that period<sup>4</sup>. The Commission may also extend the period within which a report is to be prepared and published if it considers that a relevant person<sup>5</sup> has failed, whether with or without a reasonable excuse, to comply with any requirement of a notice for attendance of witnesses or production of documents<sup>6</sup>. An extension comes into force when published<sup>7</sup>. An extension for failure to comply with a notice continues in force until the person concerned provides the information or documents to the satisfaction of the Commission or, as the case may be, appears as a witness in accordance with the requirements of the Commission or the Commission publishes its decision to cancel the extension<sup>8</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 I.e. a report under the Enterprise Act 2002 s 38 (see PARA 186).

3 Enterprise Act 2002 s 39(1). References in Pt 3 (ss 22-130) to the date of a reference are to be construed as references to the date specified in the reference as the date on which it is made: s 39(9). The provisions of s 39 are subject to s 40: s 39(10). The Secretary of State may by order amend s 39 so as to alter the period of 24 weeks mentioned in s 39(1) or any period for the time being mentioned in substitution for that period, provided that the period does not exceed 24 weeks: s 40(8)(a), (9) (s 40(8), (9) amended by SI 2004/1079). As to the Secretary of State see PARA 5. An order under the Enterprise Act 2002 s 40(8) does not affect any period of time within which the Commission is under a duty to prepare and publish its report under s 38 if the Commission is already under that duty in relation to that reference when the order is made: s 40(10). Before making an order under s 40(8) the Secretary of State must consult the Commission and such other persons as he considers appropriate: s 40(11).

4 Enterprise Act 2002 s 39(3). The Secretary of State may by order amend s 39 so as to alter the period of eight weeks mentioned in s 39(3) or any period for the time being mentioned in substitution for that period, provided that the period does not exceed eight weeks: s 40(8)(c), (9) (as amended: see note 3). See also note 3. A period extended under s 39(3) may also be extended under s 39(4) (see the text to notes 5-6) and a period extended under s 39(4) may also be extended under s 39(3): s 40(3). No more than one extension is possible under s 39(3): s 40(4).

Where a period within which a report under s 38 (see PARA 186) is to be prepared and published is extended or further extended under s 39(3) or (4), the period as extended or (as the case may be) further extended is calculated by taking the period being extended and adding to it the period of the extension (whether or not those periods overlap in time): s 40(5). Where: (1) the period within which the report under s 38 is to be prepared and published is further extended; (2) the further extension and at least one previous extension is made under s 39(4); and (3) the same days or fractions of days are included in or comprise the further extension and are included in or comprise at least one such previous extension then, in calculating the period of the further extension, any days or fractions of days of the kind mentioned in head (3) are to be disregarded: s 40(6), (7).

5 'Relevant person' means: (1) any person carrying on any of the enterprises concerned; (2) any person who (whether alone or as a member of a group) owns or has control of any such person; or (3) any officer, employee or agent of any person mentioned in head (1) or head (2): Enterprise Act 2002 s 39(5). For the purposes of s 39(5) a person or group of persons able, directly or indirectly, to control or materially to influence

the policy of a body of persons corporate or unincorporate, but without having a controlling interest in that body of persons, may be treated as having control of it: s 39(6).

6 Enterprise Act 2002 s 39(4). See also note 4. A notice for attendance of witnesses or production of documents is given under s 109 (see PARA 259).

7 Enterprise Act 2002 s 39(7). An extension is published under s 107 (see PARA 257). As to the meaning of 'publish' see PARA 186 note 2.

8 Enterprise Act 2002 s 39(8). The Secretary of State may make regulations for the purposes of s 39(8): s 40(12). The regulations may, in particular: (1) provide for the time at which information or documents are to be treated as provided (including the time at which they are to be treated as provided to the satisfaction of the Commission for the purposes of s 39(8)); (2) provide for the time at which a person is to be treated as appearing as a witness (including the time at which he is to be treated as appearing as a witness in accordance with the requirements of the Commission for the purposes of s 39(8)); (3) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which s 39(8) applies, of the fact that (a) the Commission is satisfied as to the provision of the information or documents required by it; or (b) the person concerned has appeared as a witness in accordance with the requirements of the Commission; (4) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which s 39(8) applies, of the time at which the Commission is to be treated as satisfied as mentioned in head (3)(a) or the person concerned is to be treated as having appeared as mentioned in head (3)(b): s 40(13). As to the meaning of 'enterprise' see PARA 173 note 2. As to enterprises ceasing to be distinct see PARA 176. At the date at which this volume states the law no such regulations had been made.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(i) Duty to make References/D. DETERMINATION OF REFERENCES/188. Duty to remedy effects of completed or anticipated mergers.

## **188. Duty to remedy effects of completed or anticipated mergers.**

Where a report of the Competition Commission<sup>1</sup> has been prepared and published<sup>2</sup> within the permitted period<sup>3</sup> and contains the decision that there is an anti-competitive outcome<sup>4</sup>, the Commission must take such action<sup>5</sup> as it considers to be reasonable and practicable to remedy, mitigate or prevent the substantial lessening of competition concerned and to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition<sup>6</sup>.

In making its decision, the Commission, in particular, must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it<sup>7</sup>. The Commission may, in particular, have regard to the effect of any action on any relevant customer benefits<sup>8</sup> in relation to the creation of the relevant merger situation<sup>9</sup> concerned<sup>10</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 Ie under the Enterprise Act 2002 s 38 (see PARA 186). As to the meaning of 'publish' see PARA 186 note 2.

3 Ie the period permitted by the Enterprise Act 2002 s 39 (see PARA 187).

4 Enterprise Act 2002 s 41(1). As to the meaning of 'anti-competitive outcome' see PARA 184.

5 Ie under the Enterprise Act 2002 s 82 (final undertakings: see PARA 225) or s 84 (final orders: see PARA 226). As to the meaning of 'action' see PARA 184 note 9.

6 Enterprise Act 2002 s 41(2). The decision of the Commission under s 41(2) must be consistent with its decisions as included in its report by virtue of s 35(3) or (as the case may be) s 36(2) (see PARA 184) unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently: s 41(3).

- 7 Enterprise Act 2002 s 41(4).
- 8 As to the meaning of 'relevant customer benefit' see PARA 180.
- 9 As to the meaning of 'relevant merger situation' see PARA 173.
- 10 Enterprise Act 2002 s 41(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/A. POWER TO MAKE REFERENCES/189. Intervention by the Secretary of State.

## **(ii) Public Interest Cases**

### **A. POWER TO MAKE REFERENCES**

#### **189. Intervention by the Secretary of State.**

Where: (1) the Secretary of State<sup>1</sup> has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation<sup>2</sup> has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>3</sup>; (2) no reference of a completed or anticipated merger<sup>4</sup> has been made in relation to the relevant merger situation concerned<sup>5</sup>; (3) no decision has been made not to make such a reference<sup>6</sup>; and (4) no reference is prevented from being made by statute<sup>7</sup> or by Community law or anything done under or in accordance with it<sup>8</sup>, then the Secretary of State may give an intervention notice to the Office of Fair Trading (the 'OFT')<sup>9</sup> if he believes that it is or may be the case that one or more than one public interest consideration<sup>10</sup> is relevant to a consideration of the relevant merger situation concerned<sup>11</sup>. No more than one intervention notice may be given in relation to the same relevant merger situation<sup>12</sup>.

Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised<sup>13</sup>, he must, as soon as practicable, take such action<sup>14</sup> as is within his power to ensure that it is finalised<sup>15</sup>.

Specific provision is made regarding the primacy of Community law in relation to such references<sup>16</sup>.

- 1 As to the Secretary of State see PARA 5.
- 2 As to the meaning of 'relevant merger situation' see PARA 173.
- 3 Enterprise Act 2002 s 42(1)(a). For the purposes of deciding whether a relevant merger situation has been created or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, ss 23-32 (see PARAS 173-181) (read together with s 34 (see PARA 182)) apply for the purposes of Pt 3 Ch 2 (ss 42-58A) as they do for the purposes of Pt 3 Ch 1 (ss 22-41) with the amendments made by s 42(6): see s 42(5), (6).
- 4 Ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).
- 5 Enterprise Act 2002 s 42(1)(b).
- 6 Enterprise Act 2002 s 42(1)(c). This does not include a decision made by virtue of s 33(2)(b) (see PARA 182) or a decision to accept undertakings under s 73 (see PARA 217) instead of making such a reference: s 42(1)(c).

7 le under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182) by virtue of s 22(3)(a) or (e) or (as the case may be) s 33(3)(a) or (e).

8 Enterprise Act 2002 s 42(1)(d). See further PARA 24 et seq.

9 As to the OFT see PARAS 6-8.

10 For the purposes of the Enterprise Act 2002 Pt 3 (ss 22-130), a public interest consideration is a consideration which, at the time of the giving of the intervention notice concerned, is specified in s 58 (see PARA 203) or is not so specified but, in the opinion of the Secretary of State, ought to be so specified: s 42(3).

11 Enterprise Act 2002 s 42(2). In Pt 3 such a notice is an 'intervention notice': ss 42(2), 130. As to intervention notices see PARA 190. No reference may be made under s 22 (see PARA 172) or s 33 (see PARA 182) if an intervention notice is in force in relation to the matter or the matter to which such a notice relates has been finally determined under Pt 3 Ch 2 (ss 42-58A) otherwise than in circumstances in which a notice is then given to the OFT under s 56(1) (see PARA 202): see ss 22(3)(d), 33(3)(d).

12 Enterprise Act 2002 s 42(4).

13 For the purposes of the Enterprise Act 2002 Pt 3, a public interest consideration is finalised if: (1) it is specified in s 58 (see PARA 203) otherwise than by virtue of an order under s 58(3); or (2) it is specified in s 58 by virtue of an order under s 58(3) and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with s 124(7) (see PARA 273) and within the period mentioned in that provision: s 42(8).

14 As to the meaning of 'action' see PARA 184 note 9.

15 Enterprise Act 2002 s 42(7).

16 As to the meaning of 'Community law' see PARA 172 note 22. The power to give an intervention notice under s 42 applies in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within s 24 (see PARA 174) if the following condition is satisfied: s 122(3). The condition is that, because of EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') or anything done under or in accordance with it, the reference under the Enterprise Act 2002 s 22 to which the intervention notice relates, could not have been made earlier than four months before the date on which it is to be made: see s 122(4), (5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/A. POWER TO MAKE REFERENCES/190. Intervention notices.

## **190. Intervention notices.**

An intervention notice<sup>1</sup> must state: (1) the relevant merger situation<sup>2</sup> concerned<sup>3</sup>; (2) the public interest consideration<sup>4</sup> or considerations which are, or may be, relevant to a consideration of the relevant merger situation concerned<sup>5</sup>; and (3) where any public interest consideration concerned is not finalised<sup>6</sup>, the proposed timetable for finalising it<sup>7</sup>.

Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to a consideration of the relevant merger situation concerned, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate<sup>8</sup>.

An intervention notice comes into force when it is given and ceases to be in force when the matter to which it relates is finally determined<sup>9</sup>. For this purpose, a matter to which an intervention notice relates is finally determined if:



- (a) the time within which the Office of Fair Trading (the 'OFT')<sup>10</sup> or, if relevant, the Office of Communications ('OFCOM')<sup>11</sup> is to report to the Secretary of State<sup>12</sup> has expired and no such report has been made<sup>13</sup>;
- (b) the Secretary of State decides to accept an undertaking or group of undertakings<sup>14</sup> instead of making a reference to the Competition Commission<sup>15</sup>;
- (c) the Secretary of State otherwise decides not to make a reference to the Commission<sup>16</sup>;
- (d) the Commission cancels such a reference<sup>17</sup>;
- (e) the time within which the Commission is to prepare a report<sup>18</sup> and give it to the Secretary of State has expired and no such report has been prepared and given to the Secretary of State<sup>19</sup>;
- (f) the time within which the Secretary of State is to make and publish<sup>20</sup> a decision<sup>21</sup> has expired and no such decision has been made and published<sup>22</sup>;
- (g) the Secretary of State decides<sup>23</sup> to make no finding at all in the matter<sup>24</sup>;
- (h) the Secretary of State otherwise decides<sup>25</sup> not to make an adverse public interest finding<sup>26</sup>;
- (i) the Secretary of State decides<sup>27</sup> to make an adverse public interest finding but decides neither to accept an undertaking<sup>28</sup> nor to make an enforcement order<sup>29</sup>;
- or
- (j) the Secretary of State decides<sup>30</sup> to make an adverse public interest finding and accepts an undertaking<sup>31</sup> or makes an enforcement order<sup>32</sup>.

The time when a matter to which an intervention notice relates is finally determined is either the expiry of the time concerned<sup>33</sup>, the acceptance of the undertaking or group of undertakings concerned<sup>34</sup>, the making of the decision concerned<sup>35</sup>, the making of the decision neither to accept an undertaking nor to make an order<sup>36</sup>, or the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned<sup>37</sup>.

1 As to the power of the Secretary of State to make intervention notices see PARA 189. As to the meaning of 'intervention notice' see PARA 189 note 11. As to the Secretary of State see PARA 5.

2 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

3 Enterprise Act 2002 s 43(1)(a).

4 As to the meaning of 'public interest consideration' see PARA 189 note 10.

5 Enterprise Act 2002 s 43(1)(b).

6 As to the meaning of 'public interest consideration being finalised' see PARA 189 note 13.

7 Enterprise Act 2002 s 43(1)(c).

8 Enterprise Act 2002 s 43(2).

9 Enterprise Act 2002 s 43(3).

10 As to the OFT see PARAS 6-8.

11 As to OFCOM see PARA 19.

12 Ie under the Enterprise Act 2002 s 44 (see PARA 191) or (as the case may be) s 44A (see PARA 192).

13 Enterprise Act 2002 s 43(4)(a), (6).

14 Ie under the Enterprise Act 2002 Sch 7 para 3 (see PARA 229).

15 Enterprise Act 2002 s 43(4)(b). A reference to the Competition Commission is made under s 45 (see PARA 193). As to the Competition Commission see PARAS 9-12.

- 16 Enterprise Act 2002 s 43(4)(c).
- 17 Enterprise Act 2002 s 43(4)(d). The Commission may cancel such a reference under s 48(1) (see PARA 196) or s 53(1) (see PARA 199).
- 18 le under the Enterprise Act 2002 s 50 (see PARA 198).
- 19 Enterprise Act 2002 s 43(4)(e).
- 20 As to the meaning of 'publish' see PARA 186 note 2.
- 21 le under the Enterprise Act 2002 s 54(2) (see PARA 200).
- 22 Enterprise Act 2002 s 43(4)(f).
- 23 le under the Enterprise Act 2002 s 54(2) (see PARA 200).
- 24 Enterprise Act 2002 s 43(4)(g).
- 25 le under the Enterprise Act 2002 s 54(2) (see PARA 200).
- 26 Enterprise Act 2002 s 43(4)(h). As to adverse public interest findings see PARA 200.
- 27 le under the Enterprise Act 2002 s 54(2) (see PARA 200).
- 28 le under the Enterprise Act 2002 Sch 7 para 9 (see PARA 231).
- 29 Enterprise Act 2002 s 43(4)(i). An enforcement order is made under Sch 7 para 11 (see PARA 231).
- 30 le under the Enterprise Act 2002 s 54(2) (see PARA 200).
- 31 le under the Enterprise Act 2002 Sch 7 para 9 (see PARA 231).
- 32 Enterprise Act 2002 s 43(4)(j). An enforcement order is made under Sch 7 para 11 (see PARA 231).
- 33 le in a case falling within head (a), (e) or (f) in the text.
- 34 le in a case falling within head (b) in the text.
- 35 le in a case falling within head (c), (d), (g) or (h) in the text.
- 36 le in a case falling within head (i).
- 37 Enterprise Act 2002 s 43(5)(a)-(e). The acceptance of the undertaking or making of the order concerned applies to a case falling within head (j) in the text.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/A. POWER TO MAKE REFERENCES/191. Investigation and report by the Office of Fair Trading.

### **191. Investigation and report by the Office of Fair Trading.**

Where the Secretary of State<sup>1</sup> has given an intervention notice<sup>2</sup> in relation to a relevant merger situation<sup>3</sup>, the Office of Fair Trading (the 'OFT')<sup>4</sup>, within such period as the Secretary of State may require, must give a report to the Secretary of State in relation to the case<sup>5</sup>. The report must contain advice from the OFT on the considerations relevant to the making of a reference of a merger<sup>6</sup> which are also relevant to the Secretary of State's decision as to whether to make a reference to the Competition Commission<sup>7</sup>. The report must also contain a summary of any representations about the case which have been received by the OFT and which relate to any public interest consideration<sup>8</sup> mentioned in the intervention notice concerned (other than a

media public interest consideration<sup>9</sup>) and which is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Commission<sup>10</sup>. The report, in particular, must include decisions as to whether the OFT believes that it is, or may be, the case that:

- (1) a relevant merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>11</sup>;
- (2) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom<sup>12</sup> for goods or services<sup>13</sup>;
- (3) the market or markets concerned would not be of sufficient importance to justify the making of a reference to the Commission<sup>14</sup>;
- (4) in the case of arrangements which are in progress or in contemplation, the arrangements are not sufficiently far advanced, or not sufficiently likely to proceed, to justify the making of such a reference<sup>15</sup>;
- (5) any relevant customer benefits<sup>16</sup> in relation to the creation of the relevant merger situation concerned outweigh the substantial lessening of competition and any adverse effects of the substantial lessening of competition<sup>17</sup>; or
- (6) it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings<sup>18</sup>.

If the OFT believes that it is or may be the case that it would be appropriate to deal with the matter (disregarding any public interest considerations mentioned in the intervention notice concerned) by way of undertakings<sup>19</sup>, the report must contain descriptions of the undertakings which the OFT believes are, or may be, appropriate<sup>20</sup>.

The report may, in particular, contain a summary of any representations about the case which have been received by the OFT and which relate to any media public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Commission<sup>21</sup>. The report may also include advice and recommendations on any public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Commission<sup>22</sup>.

The Secretary of State may exclude a matter from the report if he considers the publication of the matter would be inappropriate<sup>23</sup>.

1 As to the Secretary of State see PARA 5.

2 As to intervention notices see PARA 190.

3 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

4 As to the OFT see PARAS 6-8.

5 Enterprise Act 2002 s 44(1), (2). The OFT must carry out such investigations as it considers appropriate for the purposes of producing the report: s 44(7).

6 Ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

7 Enterprise Act 2002 s 44(3)(a). A reference to the Competition Commission is made under s 45 (see PARA 193). As to the Competition Commission see PARAS 9-12.

8 As to the meaning of 'public interest consideration' see PARA 189 note 10.

9 In the Enterprise Act 2002 Pt 3 (ss 22-130), 'media public interest consideration' means any consideration which, at the time of the giving of the intervention notice concerned, is specified in s 58(2A)-(2C)

(see PARA 203) or, in the opinion of the Secretary of State, is concerned with broadcasting or newspapers and ought to be specified in s 58 (see PARA 203): ss 44(8), 130 (s 44(8)-(11) added by the Communications Act 2003 s 376(3)). 'Broadcasting' means the provision of services the provision of which: (1) is required to be licensed under the Broadcasting Act 1990 Pt 1 (ss 3-71) or Pt 3 (ss 85-126) or the Broadcasting Act 1996 Pt 1 (ss 1-39) or Pt 2 (ss 40-72) (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 261 et seq); or (2) would be required to be so licensed if provided by a person subject to licensing under the Part in question: Enterprise Act 2002 s 44(9) (as so added). 'Newspaper' means a daily, Sunday or local (other than daily or Sunday) newspaper circulating wholly or mainly in the United Kingdom or in a part of the United Kingdom: s 44(10) (as so added). The Secretary of State may by order amend s 44(9), (10): s 44(11) (as so added). At the date at which this volume states the law no such order had been made.

10 Enterprise Act 2002 s 44(3)(b) (amended by the Communications Act 2003 s 376(1)).

11 Enterprise Act 2002 s 44(4)(a).

12 As to the meaning of 'market in the United Kingdom' see PARA 172 note 5. As to the meaning of 'United Kingdom' see PARA 401 note 1.

13 Enterprise Act 2002 s 44(4)(b). As to the meanings of 'market for goods or services' and 'goods' see PARA 172 note 5.

14 Enterprise Act 2002 s 44(4)(c). A reference to the Commission is made under s 22 (see PARA 172) or s 33 (see PARA 182).

15 Enterprise Act 2002 s 44(4)(d).

16 As to the meaning of 'relevant customer benefit' see PARA 180.

17 Enterprise Act 2002 s 44(4)(e).

18 Enterprise Act 2002 s 44(4)(f). Undertakings are given under Sch 7 para 3 (see PARA 229).

19 le under the Enterprise Act 2002 Sch 7 para 3 (see PARA 229).

20 Enterprise Act 2002 s 44(5).

21 Enterprise Act 2002 s 44(5A) (added by the Communications Act 2003 s 376(2)). A reference is made to the Commission under s 45 (see PARA 193).

22 Enterprise Act 2002 s 44(6).

23 See the Enterprise Act 2002 s 118(1)(a), (2). The OFT must advise the Secretary of State as to any matters which it considers should be excluded: s 118(4). In deciding what is inappropriate, the Secretary of State must have regard to the considerations mentioned in s 244 (see PARA 334): s 118(3). References in s 38(4) (see PARA 186) and s 107(11) (see PARA 257) to the giving or laying of a report of the Commission are to be construed as references to the giving or laying of the report as published: s 118(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/A. POWER TO MAKE REFERENCES/192. Additional investigation and report by the Office of Communications in relation to media mergers.

## **192. Additional investigation and report by the Office of Communications in relation to media mergers.**

Where the Secretary of State<sup>1</sup> has given an intervention notice<sup>2</sup> in relation to a relevant merger situation<sup>3</sup> and the intervention notice mentions any media public interest consideration<sup>4</sup>, then the Office of Communications ('OFCOM')<sup>5</sup>, within such period as the Secretary of State may require, must give a report to the Secretary of State on the effect of the consideration or considerations concerned on the case<sup>6</sup>. The report must contain advice and recommendations

on any media public interest consideration mentioned in the intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Competition Commission<sup>7</sup>. The report must also contain a summary of any representations about the case which have been received by OFCOM and which relate to any such consideration<sup>8</sup>.

The Secretary of State may exclude a matter from the report if he considers the publication of the matter would be inappropriate<sup>9</sup>.

1 As to the Secretary of State see PARA 5.

2 As to intervention notices see PARA 190.

3 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

4 As to the meaning of 'media public interest consideration' see PARA 191 note 9.

5 As to OFCOM see PARA 19.

6 Enterprise Act 2002 s 44A(1), (2) (s 44A added by the Communications Act 2003 s 377). OFCOM must carry out such investigations as they consider appropriate for the purposes of producing the report: Enterprise Act 2002 s 44A(4) (as so added).

7 Enterprise Act 2002 s 44A(3)(a) (as added: see note 6). A reference to the Competition Commission is made under s 45 (see PARA 193). As to the Competition Commission see PARAS 9-12.

8 Enterprise Act 2002 s 44A(3)(b) (as added: see note 6).

9 See the Enterprise Act 2002 s 118(1)(aa), (2) (s 118(1)(aa) added by the Communications Act 2003 s 389(1), Sch 16 para 21). The OFT must advise the Secretary of State as to any matters which it considers should be excluded: Enterprise Act 2002 s 118(4). In deciding what is inappropriate, the Secretary of State must have regard to the considerations mentioned in s 244 (see PARA 334): s 118(3). References in s 38(4) (see PARA 186) and s 107(11) (see PARA 257) to the giving or laying of a report of the Commission are to be construed as references to the giving or laying of the report as published: s 118(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/A. POWER TO MAKE REFERENCES/193. Power of the Secretary of State to refer a matter to the Competition Commission.

### **193. Power of the Secretary of State to refer a matter to the Competition Commission.**

Where the Secretary of State<sup>1</sup> has given an intervention notice<sup>2</sup> in relation to a relevant merger situation<sup>3</sup> and has received a report of the Office of Fair Trading (the 'OFT')<sup>4</sup>, and any report of the Office of Communications ('OFCOM')<sup>5</sup> which is required<sup>6</sup> in relation to the matter<sup>7</sup>, then the Secretary of State may make a reference to the Competition Commission<sup>8</sup> if he believes that it is or may be the case that one of the following situations applies:

(1) a relevant merger situation has been created<sup>9</sup>; and

15. (a) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom<sup>10</sup> for goods or services<sup>11</sup>;

16. (b) one or more than one public interest consideration<sup>12</sup> mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned<sup>13</sup>; and
17. (c) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest<sup>14</sup>;
- (2) a relevant merger situation has been created<sup>15</sup>; and
18. (a) the creation of that situation has not resulted, and may be expected not to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services<sup>16</sup>;
19. (b) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned<sup>17</sup>; and
20. (c) taking account only of the relevant public interest consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest<sup>18</sup>;
- (3) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>19</sup>; and
21. (a) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services<sup>20</sup>;
22. (b) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned<sup>21</sup>; and
23. (c) taking account only of the substantial lessening of competition and the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest<sup>22</sup>;
- (4) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>23</sup>; and
24. (a) the creation of that situation may be expected not to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services<sup>24</sup>;
25. (b) one or more than one public interest consideration mentioned in the intervention notice is relevant to a consideration of the relevant merger situation concerned<sup>25</sup>; and
26. (c) taking account only of the relevant public interest consideration or considerations concerned, the creation of the relevant merger situation may be expected to operate against the public interest<sup>26</sup>.

The Secretary of State, in deciding whether to make a reference must accept the decisions of the OFT included in its report<sup>27</sup> and any descriptions of undertakings the OFT believes are appropriate<sup>28</sup>.

Where the decision to make a reference is made at any time on or after the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of

State, in deciding whether to make such a reference, must disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised before the end of that period<sup>29</sup>. Where the decision to make a reference in the situations described in head (1) or head (3) is made at any time before the end of the period of 24 weeks beginning with the giving of the intervention notice concerned, the Secretary of State, in deciding whether to make such a reference, must disregard any public interest consideration which is mentioned in the intervention notice but which has not been finalised if its effect would be to prevent, or to help to prevent, an anti-competitive outcome<sup>30</sup> from being adverse to the public interest<sup>31</sup>.

A reference must, in particular, specify the statutory provision under which it is made<sup>32</sup>, the date on which it is made<sup>33</sup> and the public interest consideration or considerations mentioned in the intervention notice concerned which the Secretary of State is not under a duty to disregard<sup>34</sup> and which he believes are or may be relevant to a consideration of the relevant merger situation concerned<sup>35</sup>.

Specific provision is made regarding the primacy of Community law in relation to such references<sup>36</sup>.

1 As to the Secretary of State see PARA 5.

2 As to intervention notices see PARA 190.

3 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

4 As to the OFT see PARAS 6-8. A report is made under the Enterprise Act 2002 s 44 (see PARA 191).

5 As to OFCOM see PARA 19.

6 Ie required by virtue of the Enterprise Act 2002 s 44A (see PARA 192).

7 Enterprise Act 2002 s 45(1) (amended by the Communications Act 2003 s 389(1), Sch 16 para 9).

8 As to the Competition Commission see PARAS 9-12. No reference may be made under the Enterprise Act 2002 s 45 if: (1) the making of the reference is prevented by s 74(1) (see PARA 218) or s 96(3) (see PARA 250) or Sch 7 para 4 (see PARA 229); (2) the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) under EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 22(1) (see PARA 74), is proceeding with the matter in pursuance of such a request or has dealt with the matter in pursuance of such a request; or (3) a reasoned submission requesting referral to the European Commission has been submitted to the European Commission under the EC Merger Regulation art 4(5): Enterprise Act 2002 ss 45(7), 46(1) (amended by the Communications Act 2003 s 406(7), Sch 19(1); and SI 2004/1079). Head (3) above ceases to apply if the Secretary of State is informed that a member state competent to examine the concentration under its national competition law has, within the time permitted by the EC Merger Regulation art 4(5), expressed its disagreement as regards the request to refer the case to the European Commission; and the Enterprise Act 2002 s 46(1A) is to be construed in accordance with the EC Merger Regulation: Enterprise Act 2002 s 46(1A) (added by SI 2004/1079).

9 Enterprise Act 2002 s 45(2)(a).

10 As to the meaning of 'market in the United Kingdom' see PARA 172 note 5. As to the meaning of 'United Kingdom' see PARA 401 note 1.

11 Enterprise Act 2002 s 45(2)(b). As to the meanings of 'market for goods or services' and 'goods' see PARA 172 note 5.

12 As to the meaning of 'public interest consideration' see PARA 189 note 10.

13 Enterprise Act 2002 s 45(2)(c).

14 Enterprise Act 2002 s 45(2)(d).

15 Enterprise Act 2002 s 45(3)(a).

16 Enterprise Act 2002 s 45(3)(b).

17 Enterprise Act 2002 s 45(3)(c).

18 Enterprise Act 2002 s 45(3)(d).

19 Enterprise Act 2002 s 45(4)(a).

20 Enterprise Act 2002 s 45(4)(b).

21 Enterprise Act 2002 s 45(4)(c).

22 Enterprise Act 2002 s 45(4)(d).

23 Enterprise Act 2002 s 45(5)(a).

24 Enterprise Act 2002 s 45(5)(b).

25 Enterprise Act 2002 s 45(5)(c).

26 Enterprise Act 2002 s 45(5)(d).

27 ie by virtue of the Enterprise Act 2002 s 44(4) (see PARA 191).

28 Enterprise Act 2002 s 46(2). The undertakings are those as mentioned in s 44(5) (see PARA 191).

29 Enterprise Act 2002 s 46(3).

30 For the purposes of the Enterprise Act 2002 Pt 3 Ch 2 (ss 42-58A), any anti-competitive outcome is to be treated as being adverse to the public interest unless it is justified by one or more than one public interest consideration which is relevant: s 45(6). As to the meaning of 'anti-competitive outcome' generally see PARA 184.

31 Enterprise Act 2002 s 46(4). The Secretary of State may, however, if he believes that there is a realistic prospect of the public interest consideration being finalised within the period of 24 weeks beginning with the giving of the intervention notice concerned, delay deciding whether to make the reference concerned until the public interest consideration is finalised or, if earlier, the period expires: s 46(5).

32 Enterprise Act 2002 s 46(6)(a).

33 Enterprise Act 2002 s 46(6)(b).

34 ie by virtue of the Enterprise Act 2002 s 46(3) (see the text to note 29).

35 Enterprise Act 2002 s 46(6)(c).

36 As to the meaning of 'Community law' see PARA 172 note 22. The power to make a reference under the Enterprise Act 2002 s 45(2) or s 45(3) applies in a case in which the relevant enterprises ceased to be distinct enterprises at a time or in circumstances not falling within s 24 (see PARA 174) if the following condition is satisfied: s 122(3). The condition is that, because of the EC Merger Regulation or anything done under or in accordance with it, the reference could not have been made earlier than four months before the date on which it is to be made: see s 122(4), (5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/B. CASES REFERRED BY THE EUROPEAN COMMISSION/194. Cases referred when an intervention notice is in force.

## ***B. CASES REFERRED BY THE EUROPEAN COMMISSION***

### **194. Cases referred when an intervention notice is in force.**



If the European Commission has by a decision referred the whole or part of a case to the Office of Fair Trading (the 'OFT')<sup>1</sup>, or is deemed to have taken such a decision, and an intervention notice<sup>2</sup> is in force in relation to that case<sup>3</sup> then, before the end of the preliminary assessment period<sup>4</sup>, the Secretary of State<sup>5</sup> must decide whether to make a reference to the Competition Commission<sup>6</sup> and inform the persons carrying on the enterprises<sup>7</sup> concerned by notice of that decision and of the reasons for it<sup>8</sup>.

The OFT may by notice<sup>9</sup> to any of the persons carrying on the enterprises concerned request him to provide the OFT with such information as the OFT may require for the purpose of enabling the Secretary of State to make the decision<sup>10</sup>. The Secretary of State may also by notice to any of the persons carrying on the enterprises concerned request him to provide the Secretary of State with such information as he may require for the purpose of enabling him to make the decision<sup>11</sup>.

If the OFT or the Secretary of State has imposed a requirement to provide information and it or he considers that the person on whom that requirement was imposed has failed to comply with it, the OFT or the Secretary of State may, by notice<sup>12</sup> to the persons carrying on the enterprises concerned, extend the preliminary assessment period<sup>13</sup>.

1 As to the OFT see PARAS 6-8. A reference is made under EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 4(4) or art 9 (see PARA 74).

2 As to the meaning of 'intervention notice' see PARA 189 note 11.

3 Enterprise Act 2002 s 46A(1) (ss 46A-46C added by SI 2004/1079).

4 'Preliminary assessment period' means the period of 45 working days beginning with the day after the day on which the decision of the European Commission to refer the case is taken (or is deemed to have been taken); and 'working day' means any day which is not a Saturday, a Sunday or a day which is a European Commission holiday (as published in the Official Journal of the European Communities before the beginning of the year in which it occurs): Enterprise Act 2002 s 46A(4) (as added: see note 3).

5 As to the Secretary of State see PARA 5.

6 Ie under the Enterprise Act 2002 s 45 (see PARA 193). As to the Competition Commission see PARAS 9-12. The Secretary of State may decide not to make a reference on the basis that he is considering whether to seek or accept undertakings under Sch 7 para 3 (see PARA 229) instead of making a reference; but a decision taken on that basis does not prevent the Secretary of State from making a reference under s 45 (see PARA 193) in the event of no such undertakings being offered or accepted: s 46A(3) (as added: see note 3).

7 As to the meaning of 'enterprise' see PARA 173 note 2.

8 Enterprise Act 2002 s 46A(2) (as added: see note 3).

9 As to the meaning of 'notice' see PARA 175 note 4. A notice under the Enterprise Act 2002 s 46C(1) or (2) (see the text to note 11) must state: (1) the information required; (2) the period within which the information is to be provided; (3) the manner (if any) in which the information is required to be provided; and (4) the possible consequences of not providing the information within the stated period and, if a manner for its provision is stated in the notice, of not providing it in that manner: s 46C(3) (as added: see note 3).

10 Enterprise Act 2002 s 46C(1) (as added: see note 3).

11 Enterprise Act 2002 s 46C(2) (as added: see note 3).

12 A notice under the Enterprise Act 2002 s 46C must be given within five working days of the end of the period within which the requirement could be complied with, and inform the person to whom it is addressed that the OFT or the Secretary of State is of the opinion that the person had failed to comply with the requirement and that it or he intends to extend the preliminary assessment period: s 46B(4) (as added: see note 3).

13 Enterprise Act 2002 s 46B(1), (2) (as added: see note 3). The period of an extension begins with the end of the period within which the requirement under s 46C could be complied with (see the text to notes 9-11) and ends with the earlier of either compliance with the requirement to the satisfaction of the OFT or the Secretary of State or cancellation by the OFT or the Secretary of State of the extension: s 46B(3) (as added: see note 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/C. REPORTS ON REFERENCES/195. Questions to be decided on references to the Competition Commission.

### ***C. REPORTS ON REFERENCES***

#### **195. Questions to be decided on references to the Competition Commission.**

On a reference by the Secretary of State<sup>1</sup>, the Competition Commission<sup>2</sup> must decide whether a relevant merger situation<sup>3</sup> has been created<sup>4</sup>. If the Commission decides that such a situation has been created, it must also decide the following additional questions:

- (1) where the Secretary of State believes that it may be the case that the creation of the relevant merger situation has resulted in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services<sup>5</sup>, whether: (a) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; and (b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration<sup>6</sup> or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest<sup>7</sup>;
- (2) where the Secretary of State believes that the creation of the relevant merger situation has not resulted in a substantial lessening of competition<sup>8</sup>, whether, taking account only of the admissible public interest consideration<sup>9</sup> or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest<sup>10</sup>;
- (3) where the Secretary of State believes that arrangements are in progress which could lead to a relevant merger situation<sup>11</sup>, whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>12</sup>;
- (4) if the Commission decides that such arrangements are in progress or in contemplation: (a) whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; and (b) whether, taking account only of any substantial lessening of competition and the admissible public interest consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest<sup>13</sup>;
- (5) if the Commission decides that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, whether, taking account only of the admissible public interest consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest<sup>14</sup>;
- (6) if the Commission has decided that the creation of a relevant merger situation operates or may be expected to operate against the public interest: (a) whether enforcement action<sup>15</sup> should be taken by the Secretary of State<sup>16</sup> for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation; (b) whether the Commission should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying,

mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation; and (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented<sup>17</sup>.

Where the Commission has decided that there is or will be a substantial lessening of competition within any market or markets in the United Kingdom for goods or services, it must also decide separately the following questions<sup>18</sup>: (i) whether action should be taken by it<sup>19</sup> for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; (ii) whether the Commission should recommend the taking of action by other persons for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has resulted from, or may be expected to result from, the substantial lessening of competition; and (iii) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented<sup>20</sup>.

In deciding whether action need be taken<sup>21</sup>, the Commission, in particular, must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effects to the public interest or to the substantial lessening of competition and any adverse effects resulting from it<sup>22</sup>.

1       Ie on a reference under the Enterprise Act 2002 s 45(2) or (3) (see PARA 193 heads (1) and (2)). As to the Secretary of State see PARA 5.

2       As to the Competition Commission see PARAS 9-12.

3       As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

4       Enterprise Act 2002 s 47(1).

5       Ie a reference under the Enterprise Act 2002 s 45(2) (see PARA 193 head (1)). As to the meaning of 'market in the United Kingdom' see PARA 172 note 5; as to the meaning of 'United Kingdom' see PARA 401 note 1; and as to the meanings of 'market for goods or services' and 'goods' see PARA 172 note 5.

6       As to the meaning of 'public interest consideration' see PARA 189 note 10.

7       Enterprise Act 2002 s 47(2). As to decisions made by the Commission under s 47 see PARA 11 note 13.

8       Ie a reference under the Enterprise Act 2002 s 45(3) (see PARA 193 head (2)).

9       'Admissible public interest consideration' means any public interest consideration which is specified in the reference under the Enterprise Act 2002 s 45 (see PARA 193) and which the Commission is not under a duty to disregard: s 47(11).

10      Enterprise Act 2002 s 47(3).

11      Ie a reference under the Enterprise Act 2002 s 45(4) or (5) (see PARA 193 heads (3), (4)).

12      Enterprise Act 2002 s 47(4).

13      Enterprise Act 2002 s 47(5).

14      Enterprise Act 2002 s 47(6).

15      As to the meaning of 'action' see PARA 184 note 9.

16      Ie under the Enterprise Act 2002 s 55 (see PARA 201).

17      Enterprise Act 2002 s 47(7).

- 18 le on the assumption that it is proceeding as mentioned in the Enterprise Act 2002 s 56(6) (see PARA 202).
- 19 le under the Enterprise Act 2002 s 41 (see PARA 188).
- 20 Enterprise Act 2002 s 47(8).
- 21 le in deciding the questions mentioned in the Enterprise Act 2002 s 47(7), (8) (see the text to notes 15-20).
- 22 Enterprise Act 2002 s 47(9). In deciding the questions mentioned in s 47(7), (8) (see the text to notes 15-20) in a case where it has decided that there is or will be a substantial lessening of competition, the Commission may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned: s 47(10). As to the meaning of 'relevant customer benefit' see PARA 180.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/C. REPORTS ON REFERENCES/196. Cases where references or certain questions need not be decided.

#### **196. Cases where references or certain questions need not be decided.**

The Competition Commission<sup>1</sup> must cancel a reference from the Secretary of State<sup>2</sup> if it considers that the proposal to make arrangements which will result in the creation of a relevant merger situation<sup>3</sup> has been abandoned<sup>4</sup>.

In relation to the question whether a relevant merger situation has been created or the question whether a relevant merger situation will be created, a reference may be framed so as to require the Commission to exclude from consideration the turnover test<sup>5</sup> or the share of supply test<sup>6</sup> or one of those tests if the Commission finds that the other is satisfied<sup>7</sup>. In relation to the share of supply test, a reference may be framed so as to require the Commission to confine its investigation to the supply of goods or services<sup>8</sup> in a part of the United Kingdom<sup>9</sup> specified in the reference<sup>10</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 le under the Enterprise Act 2002 s 45(4), (5) (see PARA 193). As to the Secretary of State see PARA 5.
- 3 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.
- 4 Enterprise Act 2002 s 48(1).
- 5 le the Enterprise Act 2002 s 23(1) (see PARA 173).
- 6 le the Enterprise Act 2002 s 23(2) (see PARA 173).
- 7 See the Enterprise Act 2002 s 48(2).
- 8 As to the meanings of 'goods', 'supply of goods' and 'supply of services' see PARA 172 note 5.
- 9 As to the meaning of 'United Kingdom' see PARA 401 note 1.
- 10 Enterprise Act 2002 s 48(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/C. REPORTS ON REFERENCES/197. Variation of references.

### **197. Variation of references.**

The Competition Commission<sup>1</sup> may, if it considers that doing so is justified by the facts (including events occurring on or after the making of the reference concerned), treat a reference by the Secretary of State<sup>2</sup> of a relevant merger situation<sup>3</sup> as if it were a reference of an anticipated merger or vice versa<sup>4</sup>. In the event of such treatment, any undertaking or order<sup>5</sup> in force in relation to the reference before that treatment continues in force and may be varied, superseded, released or revoked accordingly<sup>6</sup>.

The Secretary of State may at any time, after consulting the Commission, vary a reference<sup>7</sup>. However, no variation by the Secretary of State is capable of altering the public interest consideration<sup>8</sup> or considerations specified in the reference or the period<sup>9</sup> within which the report of the Commission<sup>10</sup> is to be prepared and given to the Secretary of State<sup>11</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 As to the Secretary of State see PARA 5.

3 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

4 Enterprise Act 2002 s 49(1). Accordingly, the Commission may treat: (1) a reference made under s 45(2) or (3) (see PARA 193 heads (1), (2)) as if it had been made under s 45(4) or (5) (see PARA 193 heads (3), (4)); or (2) a reference made under s 45(4) or (5) as if it had been made under s 45(2) or (3); and, in such cases, references in Pt 3 (ss 22-130) to references under those enactments, so far as may be necessary, are to be construed accordingly: s 49(1).

Where the Commission treats a reference made under s 45(2) or (3) as if it had been made under s 45(4) or (5), Sch 7 paras 1, 2, 7 and 8 (see PARAS 228, 230), in particular, apply as if the reference had been made under s 45(4) or (5) instead of under s 45(2) or (3): s 49(2). Where the Commission treats a reference made under s 45(4) or (5) as if it had been made under s 45(2) or (3), Sch 7 paras 1, 2, 7 and 8, in particular, apply as if the reference had been made under s 45(2) or (3) instead of under s 45(4) or (5): s 49(3).

5 Ie any undertaking accepted under the Enterprise Act 2002 Sch 7 para 1 and any order made under Sch 7 para 2 (see PARA 228): s 49(4).

6 Enterprise Act 2002 s 49(5).

7 Enterprise Act 2002 s 49(6), (7). The Secretary of State need not consult the Commission if the Commission has requested the variation concerned: s 49(8).

8 As to the meaning of 'public interest consideration' see PARA 189 note 10.

9 Ie the period permitted by the Enterprise Act 2002 s 51 (see PARA 144).

10 Ie the report required by the Enterprise Act 2002 s 50 (see PARA 198).

11 Enterprise Act 2002 s 49(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/C. REPORTS ON REFERENCES/198. Investigations and reports on references.

### **198. Investigations and reports on references.**

The Competition Commission<sup>1</sup> is required to prepare a report on a reference from the Secretary of State<sup>2</sup> and give it to the Secretary of State within the period of 24 weeks<sup>3</sup> beginning with the date of the reference concerned<sup>4</sup>. The report, in particular, must contain: (1) the decisions of the Commission on the questions which it is required to answer<sup>5</sup>; (2) its reasons for its decisions<sup>6</sup>; and (3) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions<sup>7</sup>. The Commission may carry out such investigations as it considers appropriate for the purpose of producing its report<sup>8</sup>.

The Commission may extend, by no more than eight weeks<sup>9</sup>, the period within which the report is to be prepared and given to the Secretary of State if it considers that there are special reasons why the report cannot be prepared and given to the Secretary of State within that period<sup>10</sup>. The Commission may also extend the period within which the report is to be prepared and given to the Secretary of State if it considers that a relevant person<sup>11</sup> has failed, whether with or without a reasonable excuse, to comply with any requirement of a notice<sup>12</sup> to attend as a witness or produce documents<sup>13</sup>. An extension comes into force when published<sup>14</sup>, and continues in force until the person concerned provides the information or documents to the satisfaction of the Commission or, as the case may be, appears as a witness in accordance with the requirements of the Commission or the Commission publishes its decision to cancel the extension<sup>15</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 I.e. a reference under the Enterprise Act 2002 s 45 (see PARA 193). As to the Secretary of State see PARA 5.

3 After consulting the Commission and such other persons as he considers appropriate, the Secretary of State may by order amend the Enterprise Act 2002 s 51 so as to alter the period of 24 weeks or any period for the time being mentioned in substitution for that period, provided the altered period does not exceed 24 weeks: s 52(8)(a), (9), (11) (s 52(9) amended by SI 2004/1079). At the date at which this volume states the law no such order had been made. An order under the Enterprise Act 2002 s 52(8) does not affect any period of time within which the Commission is under a duty to prepare and give to the Secretary of State its report under s 50 in relation to a reference under s 45 (see PARA 193) if the Commission is already under that duty in relation to that reference when the order is made: s 52(10).

4 Enterprise Act 2002 ss 50(1), 51(1). Where the report relates to a reference under s 45 which has been made after a report of the Office of Communications ('OFCOM') under s 44A (see PARA 192), the Commission must give a copy of its report (whether or not published) to OFCOM: s 50(2A) (added by the Communications Act 2003 s 389(1), Sch 16 para 10).

5 Enterprise Act 2002 s 50(2)(a). The Commission is required to answer questions by virtue of s 47 (see PARA 195).

6 Enterprise Act 2002 s 50(2)(b).

7 Enterprise Act 2002 s 50(2)(c).

8 Enterprise Act 2002 s 50(3).

9 After consulting the Commission and such other persons as he considers appropriate, the Secretary of State may by order amend the Enterprise Act 2002 s 51 so as to alter the period of eight weeks or any period for the time being mentioned in substitution for that period, provided the altered period does not exceed eight weeks: s 52(8)(c), (9), (11) (s 52(9) amended by SI 2004/1079). At the date at which this volume states the law no such order had been made. See also note 4.

10 Enterprise Act 2002 s 51(3). A period extended under s 51(3) may also be extended under s 51(4) (see the text to note 13) and a period extended under s 51(4) may also be extended under s 51(3): ss 51(9), 52(3). No more than one extension is possible under s 51(3): s 52(4). Where a period within which a report under s 50 is to be prepared and given to the Secretary of State is extended or further extended under s 51(3) or (4), the period as extended or (as the case may be) further extended is calculated by taking the period being extended and adding to it the period of the extension (whether or not those periods overlap in time): s 52(5).

11 'Relevant person' means: (1) any person carrying on any of the enterprises concerned; (2) any person who (whether alone or as a member of a group) owns or has control of any such person; or (3) any officer,

employee or agent of any person mentioned in head (1) or head (2): Enterprise Act 2002 s 51(5). A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body of persons corporate or unincorporate, but without having a controlling interest in that body of persons, may be treated as having control of it: s 51(6).

12 le under the Enterprise Act 2002 s 109 (see PARA 259).

13 Enterprise Act 2002 s 51(4). See note 8. Where: (1) the period within which the report under s 50 is to be prepared and given to the Secretary of State is further extended; (2) the further extension and at least one previous extension is made under s 51(4); and (3) the same days or fractions of days are included in or comprise the further extension and are included in or comprise at least one such previous extension then, in calculating the period of the further extension, any days or fractions of days of the kind mentioned in head (3) are to be disregarded: s 52(6), (7).

14 Enterprise Act 2002 s 51(7). The extension is published under s 107 (see PARA 257).

15 Enterprise Act 2002 s 51(8). The Secretary of State may make regulations for the purposes of s 51(8): s 52(12). The regulations may, in particular: (1) provide for the time at which information or documents are to be treated as provided (including the time at which they are to be treated as provided to the satisfaction of the Commission for the purposes of s 51(8)); (2) provide for the time at which a person is to be treated as appearing as a witness (including the time at which he is to be treated as appearing as a witness in accordance with the requirements of the Commission for the purposes of s 51(8)); (3) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which s 51(8) applies, of the fact that the Commission is satisfied as to the provision of the information or documents required by it or the person concerned has appeared as a witness in accordance with the requirements of the Commission; (4) provide for the persons carrying on the enterprises which have or may have ceased to be, or may cease to be, distinct enterprises to be informed, in circumstances in which s 51(8) applies, of the time at which the Commission is to be treated as satisfied as mentioned in head (3) above or the person concerned is to be treated as having appeared as mentioned in head (3) above: s 52(13). At the date at which this volume states the law no such regulations had been made. As to enterprises ceasing to be distinct see PARA 176.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/C. REPORTS ON REFERENCES/199. Restrictions on action where public interest considerations not finalised.

### **199. Restrictions on action where public interest considerations not finalised.**

The Competition Commission<sup>1</sup> must cancel a reference from the Secretary of State<sup>2</sup> if: (1) the intervention notice<sup>3</sup> concerned mentions a public interest consideration<sup>4</sup> which was not finalised<sup>5</sup> on the giving of that notice or public interest considerations which, at that time, were not finalised<sup>6</sup>; (2) no other public interest consideration is mentioned in the notice<sup>7</sup>; (3) at least 24 weeks has elapsed since the giving of the notice<sup>8</sup>; and (4) the public interest consideration mentioned in the notice has not been finalised within that period of 24 weeks or (as the case may be) none of the public interest considerations mentioned in the notice has been finalised within that period of 24 weeks<sup>9</sup>.

Where a reference to the Commission by the Secretary of State specifies a public interest consideration which has not been finalised before the making of the reference, the Commission must not give its report to the Secretary of State<sup>10</sup> in relation to that reference unless the period of 24 weeks beginning with the giving of the intervention notice concerned has expired or the public interest consideration concerned has been finalised<sup>11</sup>.

In reporting on certain questions<sup>12</sup>, the Commission must disregard any public interest consideration which has not been finalised before the giving of the report<sup>13</sup> or which was not finalised on the giving of the intervention notice concerned and has not been finalised within the period of 24 weeks beginning with the giving of the notice concerned<sup>14</sup>.

The provisions set out above are without prejudice to the power of the Commission to carry out investigations in relation to any public interest consideration to which it might be able to have regard in its report<sup>15</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 Ie under the Enterprise Act 2002 s 45 (see PARA 193). As to the Secretary of State see PARA 5.
- 3 As to the meaning of 'intervention notice' see PARA 189 note 11.
- 4 As to the meaning of 'public interest consideration' see PARA 189 note 10.
- 5 As to the meaning of 'public interest consideration being finalised' see PARA 189 note 13.
- 6 Enterprise Act 2002 s 53(1)(a).
- 7 Enterprise Act 2002 s 53(1)(b).
- 8 Enterprise Act 2002 s 53(1)(c).
- 9 Enterprise Act 2002 s 53(1)(d).
- 10 Ie under the Enterprise Act 2002 s 50 (see PARA 198).
- 11 Enterprise Act 2002 s 53(2) (amended by SI 2004/1079).
- 12 Ie any of the questions mentioned in the Enterprise Act 2002 s 47(2)(b), (3), (5)(b), (6), (7) (see PARA 195).
- 13 Enterprise Act 2002 s 53(3).
- 14 Enterprise Act 2002 s 53(4).
- 15 Enterprise Act 2002 s 53(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/D. DECISIONS OF THE SECRETARY OF STATE/200. Decisions of the Secretary of State in public interest cases.

## ***D. DECISIONS OF THE SECRETARY OF STATE***

### **200. Decisions of the Secretary of State in public interest cases.**

Where the Secretary of State<sup>1</sup> has received a report of the Competition Commission<sup>2</sup> in relation to a relevant merger situation<sup>3</sup>, the Secretary of State must decide whether to make an adverse public interest finding<sup>4</sup> in relation to the relevant merger situation<sup>5</sup> and whether to make no finding at all in the matter<sup>6</sup>. The Secretary of State may make no finding at all in the matter only if he decides that there is no public interest consideration which is relevant to a consideration of the relevant merger situation concerned<sup>7</sup>. The Secretary of State must make and publish<sup>8</sup> his decision within the period of 30 days<sup>9</sup> beginning with the receipt of the report of the Commission<sup>10</sup>.

- 1 As to the Secretary of State see PARA 5.
- 2 Ie under the Enterprise Act 2002 s 50 (see PARA 198). As to the Competition Commission see PARAS 9-12.



3 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

4 For the purposes of the Enterprise Act 2002 Pt 3 (ss 22-130) the Secretary of State makes an adverse public interest finding in relation to a relevant merger situation if, in relation to that situation, he decides: (1) in connection with a reference to the Commission under s 45(2), that it is the case as mentioned in s 45(2)(a)-(d) (see PARA 193 head (1)(a)-(d)) or s 45(3) (see PARA 193 head (2)); (2) in connection with a reference to the Commission under s 45(3), that it is the case as mentioned in s 45(3)(a)-(d) (see PARA 193 head (2)(a)-(d)); (3) in connection with a reference to the Commission under s 45(4), that it is the case as mentioned in s 45(4)(a)-(d) (see PARA 193 head (3)(a)-(d)) or s 45(5); and (4) in connection with a reference to the Commission under s 45(5), that it is the case as mentioned in s 45(5)(a)-(d) (see PARA 193 head (4)(a)-(d)): s 54(3). See note 6.

5 In deciding whether to make an adverse public interest finding under the Enterprise Act 2002 s 54(2), the Secretary of State must accept: (1) in connection with a reference to the Commission under s 45(2) or (4) (see PARA 193 heads (1), (3)), the decision of the report of the Commission under s 50 (see PARA 198) as to whether there is an anti-competitive outcome; and (2) in connection with a reference to the Commission under s 45(3) or (5) (see PARA 193 heads (2), (4)), the decision of the report of the Commission under s 50 as to whether a relevant merger situation has been created or (as the case may be) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, and the decision of the report of the Office of Fair Trading (the 'OFT') under s 44 (see PARA 191) as to the absence of a substantial lessening of competition: s 54(7). As to the OFT see PARAS 6-8.

6 Enterprise Act 2002 s 54(1), (2). In making a decision under s 54(2)-(4) (see note 4, and the text to note 7), the Secretary of State must disregard any public interest consideration not specified in the reference under s 45 (see PARA 193) and any public interest consideration disregarded by the Commission for the purposes of its report: s 54(6). As to the meaning of 'public interest consideration' see PARA 189 note 10.

7 Enterprise Act 2002 s 54(4). See note 6.

8 As to the meaning of 'publish' see PARA 186 note 2.

9 In determining the period of 30 days no account must be taken of Saturday, Sunday, Good Friday and Christmas Day, and any day which is a bank holiday in England and Wales: Enterprise Act 2002 s 54(8).

10 Enterprise Act 2002 s 54(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/D. DECISIONS OF THE SECRETARY OF STATE/201. Enforcement action by the Secretary of State.

## **201. Enforcement action by the Secretary of State.**

Where the Secretary of State<sup>1</sup> has decided<sup>2</sup> to make an adverse public interest finding<sup>3</sup> in relation to a relevant merger situation<sup>4</sup> and has published<sup>5</sup> his decision within the period so required<sup>6</sup>, then the Secretary of State may take such action<sup>7</sup> as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation concerned<sup>8</sup>. In making the decision, the Secretary of State, in particular, must have regard to the report of the Competition Commission<sup>9</sup>. In any case of a substantial lessening of competition, the Secretary of State may, in particular, have regard to the effect of any action on any relevant customer benefits<sup>10</sup> in relation to the creation of the relevant merger situation concerned<sup>11</sup>.

1 As to the Secretary of State see PARA 5.

2 Ie under the Enterprise Act 2002 s 54(2) within the period required by s 54(5) (see PARA 200).

3 As to the meaning of 'adverse public interest finding' see PARA 200 note 4.

4 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

5 As to the meaning of 'publish' see PARA 186 note 2.

6 Enterprise Act 2002 s 55(1).

7 le under the Enterprise Act 2002 Sch 7 para 9 or 11 (see PARA 227). As to the meaning of 'action' see PARA 184 note 9.

8 Enterprise Act 2002 s 55(2).

9 Enterprise Act 2002 s 55(3). The report of the Competition Commission is made under s 50 (see PARA 198). As to the Competition Commission see PARAS 9-12.

10 As to the meaning of 'relevant customer benefit' see PARA 180.

11 Enterprise Act 2002 s 55(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/D. DECISIONS OF THE SECRETARY OF STATE/202. Cessation of intervention on public interest grounds.

## **202. Cessation of intervention on public interest grounds.**

Where the Secretary of State<sup>1</sup> decides not to make a reference to the Competition Commission<sup>2</sup> on the ground that no public interest consideration<sup>3</sup> to which he is able to have regard is relevant to a consideration of the relevant merger situation<sup>4</sup> concerned, he must by notice<sup>5</sup> require the Office of Fair Trading (the 'OFT')<sup>6</sup> to deal with the matter otherwise than as a public interest case<sup>7</sup>. Where a notice is given to the OFT in these circumstances, the OFT must decide whether to make a merger reference<sup>8</sup>.

Where the Commission cancels<sup>9</sup> a reference from the Secretary of State<sup>10</sup> where a public interest consideration is not finalised and the report of the OFT<sup>11</sup> contains the decision that it is or may be the case that there is an anti-competitive outcome<sup>12</sup> in relation to the relevant merger situation concerned, the Commission may proceed with the matter as a public interest case<sup>13</sup> as if a merger reference<sup>14</sup> had been made to it by the OFT<sup>15</sup>.

Where the Secretary of State decides to make no finding at all in the matter<sup>16</sup> in connection with a reference to the Commission<sup>17</sup>, the Commission must proceed<sup>18</sup> as if a merger reference<sup>19</sup> had been made to it instead of a public interest case reference<sup>20</sup>.

1 As to the Secretary of State see PARA 5.

2 le under the Enterprise Act 2002 s 45 (see PARA 193). As to the Competition Commission see PARAS 9-12.

3 As to the meaning of 'public interest consideration' see PARA 189 note 10.

4 As to the meaning of 'relevant merger situation' see PARA 173; and see PARA 189 note 3.

5 As to the meaning of 'notice' see PARA 175 note 4.

6 As to the OFT see PARAS 6-8.

7 Enterprise Act 2002 s 56(1).

8 Enterprise Act 2002 s 56(2). A merger reference is made under s 22 (see PARA 172) or s 33 (see PARA 182). Any time-limits in relation to the Secretary of State's decision whether to make a reference to the

Commission under s 45 (see PARA 193) (including any remaining powers of extension) apply in relation to the decision of the OFT whether to make a reference under s 22 or s 33: s 56(2).

9 le under the Enterprise Act 2002 s 53(1) (see PARA 199).

10 le under the Enterprise Act 2002 s 45 (see PARA 193).

11 le under the Enterprise Act 2002 s 44 (see PARA 191).

12 As to the meaning of 'anti-competitive outcome' see PARA 184.

13 le under the Enterprise Act 2002 Pt 3 Ch 2 (ss 42-58A).

14 le under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

15 Enterprise Act 2002 s 56(3). In proceeding by virtue of s 56(3) to prepare and publish a report under s 38 (see PARA 186), the Commission must proceed as if: (1) the reference under s 22 (see PARA 172) or s 33 (see PARA 182) had been made at the same time as the reference under s 45 (see PARA 193); (2) the timetable for preparing and giving its report under s 50 (including any remaining powers of extension and as extended by an additional period of 20 days) (see PARA 198) were the timetable for preparing and publishing its report under s 38; and (3) in relation to the question whether a relevant merger situation has been created or the question whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, the Commission were confined to the questions on the subject to be investigated by it under s 47 (see PARA 195): s 56(4). In determining the period of 20 days mentioned in s 56(4) no account is to be taken of Saturday, Sunday, Good Friday and Christmas Day and any day which is a bank holiday in England and Wales: s 56(5).

Where the Commission becomes under a duty to proceed as mentioned in s 56(3) or (6) (see the text to notes 16-20), references in Pt 3 (ss 22-130) to references under s 22 (see PARA 172) and s 33 (see PARA 182), so far as may be necessary, are to be construed accordingly; and, in particular, ss 77-81 (see PARAS 221-224) apply as if a reference has been made to the Commission by the OFT under s 22 or (as the case may be) s 33: s 56(8).

16 le under the Enterprise Act 2002 s 54(2) (see PARA 200).

17 le under the Enterprise Act 2002 s 45(2) or (4) (see PARA 193 heads (1), (3)).

18 le under the Enterprise Act 2002 Pt 3.

19 le under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

20 Enterprise Act 2002 s 56(6). The Commission must also proceed as if its report to the Secretary of State under s 50 (see PARA 198) had been prepared and published by it under s 38 (see PARA 186) within the period permitted by s 39 (see PARA 187): s 56(6). In relation to proceedings by virtue of s 56(6), the reference in s 41(3) to decisions of the Commission as included in its report by virtue of s 35(3) or s 36(2) (see PARA 184) is to be construed as a reference to decisions which were included in the report of the Commission by virtue of s 47(8) (see PARA 195): s 56(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ii) Public Interest Cases/E. NATIONAL SECURITY/203. Duty to inform the Secretary of State.

## ***E. NATIONAL SECURITY***

### **203. Duty to inform the Secretary of State.**

The Office of Fair Trading (the 'OFT')<sup>1</sup>, in considering whether to make a merger reference<sup>2</sup>, must bring to the attention of the Secretary of State<sup>3</sup> any case which it believes raises any national security consideration<sup>4</sup> unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case<sup>5</sup>.

The interests of national security<sup>6</sup> are specified as follows<sup>7</sup>:

- (1) the need for accurate presentation of news and free expression of opinion in newspapers<sup>8</sup>;
- (2) the need for, to the extent that it is reasonable and practicable, a sufficient plurality of views in newspapers in each market for newspapers in the United Kingdom<sup>9</sup> or a part of the United Kingdom<sup>10</sup>;
- (3) the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises<sup>11</sup> serving that audience<sup>12</sup>;
- (4) the need for the availability throughout the United Kingdom of a wide range of broadcasting<sup>13</sup> which, taken as a whole, is both of high quality and calculated to appeal to a wide variety of tastes and interests<sup>14</sup>;
- (5) the need for persons carrying on media enterprises, and for those with control of such enterprises, to have a genuine commitment to the attainment in relation to broadcasting of the programme and fairness standards objectives<sup>15</sup>; and
- (6) the interest of maintaining the stability of the UK financial system<sup>16</sup>.

The Secretary of State may by order modify these provisions for the purpose of specifying a new consideration or removing or amending any consideration which is for the time being specified<sup>17</sup>. Such an order may, in particular, provide for a consideration to be specified for a particular purpose or purposes or for all purposes<sup>18</sup>. An order may apply in relation to cases under consideration by the OFT, OFCOM, the Commission or the Secretary of State before the making of the order as well as cases under consideration on or after the making of the order<sup>19</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

3 As to the Secretary of State see PARA 5.

4 Ie any consideration specified in the Enterprise Act 2002 s 58 (see the text and notes 7-19).

5 Enterprise Act 2002 s 57(1).

6 'National security' includes public security; and 'public security' has the same meaning as in EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 21(4) (see PARA 74); Enterprise Act 2002 s 58(2) (amended by SI 2004/1079).

7 Enterprise Act 2002 s 58(1).

8 Enterprise Act 2002 s 58(2A) (s 58(2A)-(2C) added by the Communications Act 2003 s 375(1)).

9 As to the meaning of 'United Kingdom' see PARA 401 note 1.

10 Enterprise Act 2002 s 58(2B) (as added: see note 8).

11 An enterprise is a media enterprise if it consists in or involves broadcasting: Enterprise Act 2002 s 58A(1) (s 58A added by the Communications Act 2003 s 375(2)). In the case of a merger situation in which at least one of the enterprises ceasing to be distinct consists in or involves broadcasting, the references in the Enterprise Act 2002 s 58(2C)(a) (see head (3) in the text) or s 58A to media enterprises include references to newspaper enterprises: s 58A(2) (as so added). As to enterprises ceasing to be distinct see PARA 176. In Pt 3 (ss 22-130), 'newspaper enterprise' means an enterprise consisting in or involving the supply of newspapers: s 58A(3) (as so added). As to the meaning of 'newspaper' see PARA 191 note 9.

Wherever in a merger situation two media enterprises serving the same audience cease to be distinct, the number of such enterprises serving that audience is assumed to be more immediately before they cease to be distinct than it is afterwards: s 58A(4) (as so added). For the purposes of s 58, where two or more media enterprises would fall to be treated as under common ownership or common control for the purposes of s 26 (see PARA 176) or are otherwise in the same ownership or under the same control, they are to be treated (subject to s 58A(4)) as all under the control of only one person: s 58A(5) (as so added). A reference in s 58 or s 58A to an audience is to be construed in relation to a media enterprise in whichever of the following ways the

decision-making authority considers appropriate: (1) as a reference to any one of the audiences served by that enterprise, taking them separately; (2) as a reference to all the audiences served by that enterprise, taking them together; (3) as a reference to a number of those audiences taken together in such group as the decision-making authority considers appropriate; or (4) as a reference to a part of anything that could be taken to be an audience under any of heads (1)-(3): s 58A(6) (as so added). The criteria for deciding who can be treated for this purpose as comprised in an audience, or as comprised in an audience served by a particular service is such as the decision-making authority considers appropriate in the circumstances of the case, and may allow for persons to be treated as members of an audience if they are only potentially members of it: s 58A(7) (as so added). 'Audience' includes readership: s 58A(8) (as so added). As to the meaning of 'decision-making authority' see PARA 173 note 8.

The power under s 58(3) to modify s 58 (see the text and note 17) includes power to modify s 58A: s 58A(9) (as so added).

12 Enterprise Act 2002 s 58(2C)(a) (as added: see note 8). Associated persons, and any bodies corporate which they or any of them control, are to be treated as one person for the purposes of s 58(2C): s 127(1)(aa) (added by the Communications Act 2003 s 375(3)). See PARA 176.

13 As to the meaning of 'broadcasting' see PARA 191 note 9.

14 Enterprise Act 2002 s 58(2C)(b) (as added: see note 8).

15 Enterprise Act 2002 s 58(2C)(c) (as added: see note 8). The standards objectives are those set out in the Communications Act 2003 s 319 (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 289).

16 Enterprise Act 2002 s 58(2D) (added by SI 2008/2645). This does not include the interest of maintaining the stability of the UK financial system for the purposes of European mergers (see the Enterprise Act 2002 ss 67, 68; and PARAS 213-214) or references made, or deemed to be made, by the European Commission to the OFT under EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 4(4) or 9 (see PARA 74).

17 Enterprise Act 2002 s 58(3). In exercise of this power, the Secretary of State has made the Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008, SI 2008/2645.

The OFT, the Office of Communications ('OFCOM') and the Competition Commission must bring to the attention of the Secretary of State any representations about exercising his powers under the Enterprise Act 2002 s 58(3) which have been made to the OFT, OFCOM or the Commission: s 57(2). As to OFCOM see PARA 19. As to the Competition Commission see PARAS 9-12.

18 Enterprise Act 2002 s 58(4)(a).

19 Enterprise Act 2002 s 58(4)(b).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/204. Intervention by the Secretary of State in special public interest cases.

### **(iii) Other Special Cases**

#### **A. SPECIAL PUBLIC INTEREST CASES**

##### **204. Intervention by the Secretary of State in special public interest cases.**

Where the Secretary of State<sup>1</sup> has reasonable grounds for suspecting that it is or may be the case that a special merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation<sup>2</sup>, then the Secretary of State may give a special intervention notice to the Office of Fair Trading (the 'OFT')<sup>3</sup> if he believes that it is or may be the case that one or more than one

national security consideration<sup>4</sup> is relevant to a consideration of the special merger situation concerned<sup>5</sup>.

A special merger situation has been created if:

- (1) no relevant merger situation has been created as the enterprise<sup>6</sup> does not pass the turnover test<sup>7</sup> or the share of supply test<sup>8</sup> but a relevant merger situation would otherwise have been created<sup>9</sup>; and
- (2) immediately before the enterprises concerned ceased to be distinct:
  - 27. (a) at least one of the enterprises concerned was carried on in the United Kingdom<sup>10</sup> or by or under the control of a body corporate incorporated in the United Kingdom and a person carrying on one or more of the enterprises concerned was a relevant government contractor<sup>11</sup>;
  - 28. (b) in relation to the supply of newspapers<sup>12</sup> of any description<sup>13</sup>, at least one-quarter<sup>14</sup> of all the newspapers of that description which were supplied in the United Kingdom, or in a substantial part of the United Kingdom, were supplied by the person or persons by whom one of the enterprises concerned was carried on<sup>15</sup>; or
  - 29. (c) in relation to the provision of broadcasting<sup>16</sup> of any description, at least one-quarter of all broadcasting of that description provided in the United Kingdom, or in a substantial part of the United Kingdom, was provided by the person or persons by whom one of the enterprises concerned was carried on<sup>17</sup>.

No more than one special intervention notice may be given in relation to the same special merger situation<sup>18</sup>.

1 As to the Secretary of State see PARA 5.

2 Enterprise Act 2002 s 59(1).

3 As to the OFT see PARAS 6-8.

4 Is a consideration specified in the Enterprise Act 2002 s 58 (see PARA 203).

5 Enterprise Act 2002 s 59(2). As to special intervention notices see PARA 205.

6 As to the meaning of 'enterprise' see PARA 173 note 2.

7 As to the turnover test see the Enterprise Act 2002 s 23(1)(b); and PARAS 173, 178.

8 As to the share of supply test see the Enterprise Act 2002 s 23(2)(b); and PARA 173.

9 Enterprise Act 2002 s 59(3)(a), (3A) (s 59(3) substituted, and s 59(3A)-(3D) added, by the Communications Act 2003 s 378(1)). For the purposes of deciding whether a relevant merger situation has been created or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, the Enterprise Act 2002 ss 23-32 (read together with s 34) (see PARAS 173-182) apply for the purposes of Pt 3 Ch 3 (ss 59-70) as they do for the purposes of Pt 3 Ch 1 (ss 22-41) with certain modifications: see s 59(5), (6).

10 As to the meaning of 'United Kingdom' see PARA 401 note 1.

11 Enterprise Act 2002 s 59(3)(b)(i), (3B) (as substituted and added: see note 9). 'Relevant government contractor' means: (1) a government contractor who has been notified by or on behalf of the Secretary of State of information, documents or other articles relating to defence and of a confidential nature which the government contractor or an employee of his may hold or receive in connection with being such a contractor and whose notification has not been revoked by or on behalf of the Secretary of State; or (2) a former government contractor who was so notified when he was a government contractor and whose notification has

not been revoked by or on behalf of the Secretary of State: s 59(8). 'Defence' has the same meaning as in the Official Secrets Act 1989 s 2 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 484); and 'government contractor' has the same meaning as in the Official Secrets Act 1989 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 483) and includes any sub-contractor of a government contractor, any sub-contractor of that sub-contractor and any other sub-contractor in a chain of sub-contractors which begins with the sub-contractor of the government contractor: Enterprise Act 2002 s 59(9).

12 As to the meaning of 'newspaper' see PARA 191 note 9. References in the Enterprise Act 2002 s 59(3C) to the supply of newspapers, in relation to newspapers of any description which are the subject of different forms of supply, is to be construed in whichever of the following ways the decision-making authority considers appropriate: (1) as references to any of those forms of supply taken separately; (2) as references to all those forms of supply taken together; or (3) as references to any of those forms of supply taken in groups: s 59A(2) (s 59A added by the Communications Act 2003 s 378(3)). As to the meaning of 'decision-making authority' see PARA 173 note 8. For these purposes, the decision-making authority may treat newspapers as being the subject of different forms of supply whenever: (a) the transactions concerned differ as to their nature, their parties, their terms or their surrounding circumstances; and (b) the difference is one which, in the opinion of the decision-making authority, ought for these purposes to be treated as a material difference: Enterprise Act 2002 s 59A(3) (as so added).

13 The criteria for deciding when newspapers or broadcasting can be treated, for the purposes of the Enterprise Act 2002 s 59, as newspapers or broadcasting of a separate description is to be such as in any particular case the decision-making authority considers appropriate in the circumstances of that case: s 59A(6) (as added: see note 12).

14 For the purpose of deciding whether the proportion of one-quarter mentioned in the Enterprise Act 2002 s 59(3C), (3D) is fulfilled with respect to newspapers of any description, or broadcasting of any description, the decision-making authority must apply such criterion (whether value, cost, price, quantity, capacity, number of workers employed or some other criterion, of whatever nature), or such combination of criteria, as the decision-making authority considers appropriate: s 59A(1) (as added: see note 12).

15 Enterprise Act 2002 s 59(3)(b)(ii), (3C) (as substituted and added: see note 9). The Secretary of State may by order amend the conditions mentioned in s 59(3)(b)(ii), (iii) (see head (2)(c) in the text): s 59(6A) (added by the Communications Act 2003 s 378(2)). At the date at which this volume states the law no such order had been made.

16 As to the meaning of 'broadcasting' see PARA 191 note 9. References to the provision of broadcasting, in relation to broadcasting of any description which is the subject of different forms of provision, are to be construed in whichever of the following ways the decision-making authority considers appropriate: (1) as references to any of those forms of provision taken separately; (2) as references to all those forms of provision taken together; or (3) as references to any of those forms of provision taken in groups: Enterprise Act 2002 s 59A(4) (as added: see note 12). The decision-making authority may treat broadcasting as being the subject of different forms of provision whenever: (a) the transactions concerned differ as to their nature, their parties, their terms or their surrounding circumstances; and (b) the difference is one which, in the opinion of the decision-making authority, ought for these purposes to be treated as a material difference: s 59A(5) (as added: see note 12). 'Provision' and cognate expressions have the same meaning in relation to broadcasting as in the Communications Act 2003 Pt 3 (ss 198-362) (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 312), subject to the Enterprise Act 2002 s 59A(4), (5): s 59A(7) (as added: see note 12).

17 Enterprise Act 2002 s 59(3)(b)(iii), (3D) (as substituted and added: see note 9). See notes 14, 15.

18 Enterprise Act 2002 s 59(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/205. Special intervention notices.

## 205. Special intervention notices.

A special intervention notice<sup>1</sup> must state the special merger situation<sup>2</sup> concerned and the national security considerations<sup>3</sup> which are, or may be, relevant to the special merger situation concerned<sup>4</sup>.

Where the Secretary of State<sup>5</sup> believes that it is or may be the case that two or more national security considerations are relevant to a consideration of the special merger situation concerned, he may decide not to mention in the special intervention notice such of those considerations as he considers appropriate<sup>6</sup>.

A special intervention notice comes into force when it is given and ceases to be in force when the matter to which it relates is finally determined<sup>7</sup>.

1       le a notice given under the Enterprise Act 2002 s 59 (see PARA 204).

2       As to the meaning of 'special merger situation' see PARA 204.

3       le the consideration specified in the Enterprise Act 2002 s 58 (see PARA 203).

4       Enterprise Act 2002 s 60(1).

5       As to the Secretary of State see PARA 5.

6       Enterprise Act 2002 s 60(2).

7       Enterprise Act 2002 s 60(3). For the purposes of Pt 3 (ss 22-130), a matter to which a special intervention notice relates is finally determined under Pt 3 Ch 3 (ss 59-70) if:

(1)       the time within which the Office of Fair Trading (the 'OFT') or, if relevant, the Office of Communications ('OFCOM') is to report to the Secretary of State under s 61 or (as the case may be) s 61A (see PARAS 206-207) has expired and no such report has been made (s 60(4)(a));

(2)       the Secretary of State decides to accept an undertaking or group of undertakings under Sch 7 para 3 (see PARA 229) instead of making a reference under s 62 (see PARA 208) (s 60(4)(b));

(3)       the Secretary of State otherwise decides not to make a reference under s 62 (see PARA 208) (s 60(4)(c));

(4)       the Competition Commission cancels such a reference under s 64(1) (see PARA 210) (s 60(4)(d));

(5)       the time within which the Commission is to prepare a report under s 65 (see PARA 211) and give it to the Secretary of State has expired and no such report has been prepared and given to the Secretary of State (s 60(4)(e));

(6)       the time within which the Secretary of State is to make and publish a decision under s 66(2) (see PARA 212) has expired and no such decision has been made and published (s 60(4)(f));

(7)       the Secretary of State decides under s 66(2) otherwise than as mentioned in s 66(5) (see PARA 212) (s 60(4)(g));

(8)       the Secretary of State decides under s 66(2) as mentioned in s 66(5) (see PARA 212) but decides neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11 (see PARA 231) (s 60(4)(h)); or

(9)       the Secretary of State decides under s 66(2) as mentioned in s 66(5) (see PARA 212) and accepts an undertaking under Sch 7 para 9 or makes an order under Sch 7 para 11 (see PARA 231) (s 60(4)(i)).

For the purposes of Pt 3, the time when a matter to which a special intervention notice relates is finally determined under Pt 3 Ch 3 is: (a) in a case falling within head (1), (5) or (6), the expiry of the time concerned; (b) in a case falling within head (2), the acceptance of the undertaking or group of undertakings concerned; (c) in a case falling within head (3), (4) or (7), the making of the decision concerned; (d) in a case falling within head (8), the making of the decision neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11; and (e) in a case falling within head (9), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned: s 60(5).



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/206. Initial investigation and report by the Office of Fair Trading.

## **206. Initial investigation and report by the Office of Fair Trading.**

Where the Secretary of State<sup>1</sup> has given a special intervention notice<sup>2</sup> in relation to a special merger situation<sup>3</sup>, the Office of Fair Trading (the 'OFT')<sup>4</sup>, within such period as the Secretary of State may require, must give a report to the Secretary of State in relation to the case<sup>5</sup>.

The report must contain: (1) advice from the OFT on the considerations relevant to the making of a merger reference<sup>6</sup> which are also relevant to the Secretary of State's decision as to whether to make a special merger reference to the Competition Commission<sup>7</sup>; and (2) a summary of any representations about the case which have been received by the OFT and which relate to any consideration mentioned in the special intervention notice concerned<sup>8</sup> and which is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Commission<sup>9</sup>. The report must include a decision as to whether the OFT believes<sup>10</sup> that it is, or may be, the case that a special merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation<sup>11</sup>. The report may, in particular, contain a summary of any representations about the case which have been received by the OFT and which relate to any consideration which is mentioned in the special intervention notice concerned and, at the time of the giving of that notice, was specified as a national security consideration<sup>12</sup> and is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Commission<sup>13</sup>. The report may also, in particular, include advice and recommendations on any consideration mentioned in the special intervention notice concerned and which is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Commission<sup>14</sup>.

The OFT must carry out such investigations as it considers appropriate for the purposes of producing the report<sup>15</sup>.

The Secretary of State may exclude a matter from the report if he considers the publication of the matter would be inappropriate<sup>16</sup>.

1 As to the Secretary of State see PARA 5.

2 I.e. a notice given under the Enterprise Act 2002 s 59 (see PARA 204).

3 Enterprise Act 2002 s 61(1). As to the meaning of 'special merger situation' see PARA 204.

4 As to the OFT see PARAS 6-8.

5 Enterprise Act 2002 s 61(2).

6 I.e. a reference under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

7 Enterprise Act 2002 s 61(3)(a). A special merger reference by the Secretary of State to the Competition Commission is made under s 62 (see PARA 208). As to the Competition Commission see PARAS 9-12.

8 This does not include a national security consideration which, at the time of the giving of the notice, was specified in the Enterprise Act 2002 s 58(2A)-(2C) (see PARA 203): s 61(3)(b) (amended by the Communications Act 2003 s 379(1), (2)).

9 Enterprise Act 2002 s 61(3)(b) (as amended: see note 8).

10 le disregarding the issue of whether a person carrying on one of the enterprises concerned was a government contractor: see the Enterprise Act 2002 s 59(3B)(b).

11 Enterprise Act 2002 s 61(4) (amended by the Communications Act 2003 s 379(1), (3)).

12 le specified in the Enterprise Act 2002 s 58(2A)-(2C) (see PARA 203).

13 Enterprise Act 2002 s 61(4A) (added by the Communications Act 2003 s 379(1), (4)).

14 Enterprise Act 2002 s 61(5).

15 Enterprise Act 2002 s 61(6).

16 See the Enterprise Act 2002 s 118(1)(a), (2). The OFT must advise the Secretary of State as to any matters which it considers should be excluded: s 118(4). In deciding what is inappropriate, the Secretary of State must have regard to the considerations mentioned in s 244 (see PARA 334): s 118(3). References in s 38(4) (see PARA 186) and s 107(11) (see PARA 257) to the giving or laying of a report of the Commission are to be construed as references to the giving or laying of the report as published: s 118(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/207. Investigation and report by the Office of Communications in relation to media mergers.

## **207. Investigation and report by the Office of Communications in relation to media mergers.**

Where the Secretary of State<sup>1</sup> has given a special intervention notice<sup>2</sup> in relation to a special merger situation<sup>3</sup> and the special intervention notice mentions any national security consideration which, at the time of the giving of the notice, was specified in relation to media mergers<sup>4</sup>, the Office of Communications ('OFCOM')<sup>5</sup>, within such period as the Secretary of State may require, must give a report to the Secretary of State on the effect of the consideration or considerations concerned on the case<sup>6</sup>.

The report must contain advice and recommendations on any consideration which is mentioned in the special intervention notice concerned and, at the time of the giving of that notice, was specified in relation to media mergers<sup>7</sup> and is or may be relevant to the Secretary of State's decision as to whether to make a reference to the Competition Commission<sup>8</sup>. The report must also contain a summary of any representations about the case which have been received by OFCOM and which relate to any such consideration<sup>9</sup>.

OFCOM must carry out such investigations as they consider appropriate for the purposes of producing the report<sup>10</sup>.

The Secretary of State may exclude a matter from the report if he considers the publication of the matter would be inappropriate<sup>11</sup>.

1 As to the Secretary of State see PARA 5.

2 le a notice given under the Enterprise Act 2002 s 59 (see PARA 204).

3 Enterprise Act 2002 s 61A(1)(a) (s 61A added by the Communications Act 2003 s 380). As to the meaning of 'special merger situation' see PARA 204.

4 Enterprise Act 2002 s 61A(1)(b) (as added: see note 3). A national security consideration is specified in s 58(2A)-(2C) (see PARA 203).

5 As to OFCOM see PARA 19.

6 Enterprise Act 2002 s 61A(2) (as added: see note 3).

7 Enterprise Act 2002 s 61A(3)(a)(i) (as added: see note 3).

8 Enterprise Act 2002 s 61A(3)(a)(ii) (as added: see note 3).

9 Enterprise Act 2002 s 61A(3)(b) (as added: see note 3).

10 Enterprise Act 2002 s 61A(4) (as added: see note 3).

11 See the Enterprise Act 2002 s 118(1)(aa), (2) (s 118(1)(aa) added by the Communications Act 2003 s 389(1), Sch 16 para 21). The OFT must advise the Secretary of State as to any matters which it considers should be excluded: Enterprise Act 2002 s 118(4). In deciding what is inappropriate, the Secretary of State must have regard to the considerations mentioned in s 244 (see PARA 334): s 118(3). References in s 38(4) (see PARA 186) and s 107(11) (see PARA 257) to the giving or laying of a report of the Commission are to be construed as references to the giving or laying of the report as published: s 118(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/208. Power of Secretary of State to refer the matter.

## **208. Power of Secretary of State to refer the matter.**

Where the Secretary of State<sup>1</sup> has given a special intervention notice<sup>2</sup> in relation to a special merger situation<sup>3</sup> and has received a report of the Office of Fair Trading the 'OFT'<sup>4</sup> and any report of the Office of Communications ('OFCOM')<sup>5</sup> which is required in relation to the matter<sup>6</sup>, the Secretary of State may make a reference to the Competition Commission<sup>7</sup> if he believes that it is or may be the case that: (1) a special merger situation has been created<sup>8</sup>; (2) one or more than one consideration mentioned in the special intervention notice is relevant to a consideration of the special merger situation concerned<sup>9</sup>; and (3) taking account only of the relevant consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest<sup>10</sup>.

The Secretary of State may also make a reference to the Commission if he believes that it is or may be the case that: (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation<sup>11</sup>; (b) one or more than one consideration mentioned in the special intervention notice is relevant to a consideration of the special merger situation concerned<sup>12</sup>; and (c) taking account only of the relevant consideration or considerations concerned, the creation of that situation may be expected to operate against the public interest<sup>13</sup>.

No reference may be made to the Commission if the Secretary of State has accepted an undertaking in relation to the special merger situation<sup>14</sup>.

The Secretary of State, in deciding whether to make a reference to the Commission, must accept the decision of the OFT included in its report as to whether a special merger situation has been created or is in contemplation<sup>15</sup>.

A reference by the Secretary of State must, in particular, specify the statutory provision under which it is made, the date on which it is made and the consideration or considerations mentioned in the special intervention notice which the Secretary of State believes are, or may be, relevant to a consideration of the special merger situation concerned<sup>16</sup>.

1 As to the Secretary of State see PARA 5.

- 2      le a notice given under the Enterprise Act 2002 s 59 (see PARA 204).
- 3      Enterprise Act 2002 s 62(1)(a). As to the meaning of 'special merger situation' see PARA 204.
- 4      le under the Enterprise Act 2002 s 61 (see PARA 206). As to the OFT see PARAS 6-8.
- 5      le under the Enterprise Act 2002 s 61A (see PARA 207). As to OFCOM see PARA 19.
- 6      Enterprise Act 2002 s 62(1)(b) (amended by the Communications Act 2003 s 389(1), Sch 16 para 14).
- 7      As to the Competition Commission see PARAS 9-12.
- 8      Enterprise Act 2002 s 62(2)(a).
- 9      Enterprise Act 2002 s 62(2)(b).
- 10     Enterprise Act 2002 s 62(2)(c).
- 11     Enterprise Act 2002 s 62(3)(a).
- 12     Enterprise Act 2002 s 62(3)(b).
- 13     Enterprise Act 2002 s 62(3)(c).
- 14     Enterprise Act 2002 s 62(4) (amended by the Communications Act 2003 s 406(7), Sch 19(1)). In such case the reference is prevented by the Enterprise Act 2002 Sch 7 para 4 (see PARA 229).
- 15     Enterprise Act 2002 s 62(5). The decision of the OFT on this matter is under s 61(4) (see PARA 206).
- 16     Enterprise Act 2002 s 62(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/209. Questions to be decided on references of special merger situations.

## **209. Questions to be decided on references of special merger situations.**

The Competition Commission<sup>1</sup>, on a reference from the Secretary of State<sup>2</sup>, must decide whether a special merger situation<sup>3</sup> has been created<sup>4</sup>, or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation<sup>5</sup>.

If the Commission decides that a special merger situation has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation, it must then decide whether, taking account only of the consideration or considerations mentioned in the reference, the creation of that situation operates or may be expected to operate against the public interest<sup>6</sup>.

If the Commission has decided that the creation of a special merger situation operates or may be expected to operate against the public interest, it must then decide the following additional questions<sup>7</sup>:

- (1)      whether enforcement action<sup>8</sup> should be taken by the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the special merger situation concerned<sup>9</sup>;

- (2) whether the Commission should recommend the taking of other action<sup>10</sup> by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the special merger situation concerned<sup>11</sup>; and
- (3) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented<sup>12</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 le under the Enterprise Act 2002 s 62(2) or s 62(3) (see PARA 208). As to the Secretary of State see PARA 5.
- 3 As to the meaning of 'special merger situation' see PARA 204.
- 4 Enterprise Act 2002 s 63(1).
- 5 Enterprise Act 2002 s 63(2).
- 6 Enterprise Act 2002 s 63(3).
- 7 Enterprise Act 2002 s 63(4).
- 8 le under the Enterprise Act 2002 s 66 (see PARA 212).
- 9 Enterprise Act 2002 s 63(4)(a).
- 10 As to the meaning of 'action' see PARA 184 note 9.
- 11 Enterprise Act 2002 s 63(4)(b).
- 12 Enterprise Act 2002 s 63(4)(c).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/210. Cancellation and variation of references.

## **210. Cancellation and variation of references.**

The Competition Commission<sup>1</sup> must cancel a reference of an anticipated special merger situation<sup>2</sup> if it considers that the proposal to make arrangements that will result in a special merger situation has been abandoned<sup>3</sup>.

The Commission may, if it considers that doing so is justified by the facts (including events occurring on or after the making of the reference concerned), treat a reference of a special merger situation as if it were a reference of an anticipated special merger situation and vice versa<sup>4</sup>. Where the Commission treats a reference in this way, any undertaking<sup>5</sup> or order<sup>6</sup> which is in force, continues in force as if it had been made in relation to the reference as so treated and the undertaking or order concerned may be varied, superseded, released or revoked accordingly<sup>7</sup>.

The Secretary of State may at any time vary a reference after consulting the Commission<sup>8</sup>. However, no variation by the Secretary of State is capable of altering the consideration or considerations specified in the reference or the period within which the report of the Commission<sup>9</sup> is to be prepared and given to the Secretary of State<sup>10</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 Ie a reference under the Enterprise Act 2002 s 62(3) (see PARA 208). As to the meaning of 'special merger situation' see PARA 204.
- 3 Enterprise Act 2002 s 64(1).
- 4 Enterprise Act 2002 s 64(2). The Commission may treat a reference made under s 62(2) or s 62(3) (see PARA 208) as if it had been made under s 62(3) or (as the case may be) s 62(2); and, in such cases, references in Pt 3 (ss 22-130) to references under those enactments, so far as may be necessary, are to be construed accordingly: s 64(2). Where, by virtue of s 64(2), the Commission treats a reference made under s 62(2) or s 62(3) as if it had been made under s 62(3) or (as the case may be) s 62(2), Sch 7 paras 1, 2, 7, 8 (undertakings: see PARAS 228, 230), in particular, apply as if the reference had been made under s 62(3) or (as the case may be) s 62(2) instead of under s 62(2) or s 62(3): s 64(3).
- 5 Ie any undertaking accepted under the Enterprise Act 2002 Sch 7 para 1 (see PARA 228).
- 6 Ie any order made under the Enterprise Act 2002 Sch 7 para 2 (see PARA 228).
- 7 Enterprise Act 2002 s 64(4), (5).
- 8 Enterprise Act 2002 s 64(6), (7). The Secretary of State need not consult the Commission if the Commission had requested the variation concerned: s 64(8). As to the Secretary of State see PARA 5.
- 9 Ie under the Enterprise Act 2002 s 65 (see PARA 211).
- 10 Enterprise Act 2002 s 64(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/211. Investigations and reports on references.

## **211. Investigations and reports on references.**

The Competition Commission<sup>1</sup> must prepare a report on a reference of a special merger situation<sup>2</sup> and give it to the Secretary of State<sup>3</sup> within the period of 24 weeks beginning with the date of the reference concerned<sup>4</sup>.

The report, in particular, must contain the decisions of the Commission on the questions to be decided on a reference<sup>5</sup>, its reasons for its decisions and such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions<sup>6</sup>.

Where the report relates to a reference which has been made after a report of the Office of Communications ('OFCOM')<sup>7</sup>, the Commission must give a copy of its report, whether or not published, to OFCOM<sup>8</sup>.

The Commission must carry out such investigations as it considers appropriate for the purpose of producing the report<sup>9</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 Ie a reference under the Enterprise Act 2002 s 62 (see PARA 208). As to the meaning of 'special merger situation' see PARA 204.
- 3 As to the Secretary of State see PARA 5.

4 Enterprise Act 2002 s 65(1), (3). The provisions of s 51 and s 52 (time limits: see PARA 198) (but not s 53 (see PARA 199)) apply for the purposes of a report under s 65 as they apply for the purposes of a report under s 50: s 65(3).

5 le the questions the Commission is required to answer by virtue of the Enterprise Act 2002 s 63 (see PARA 209).

6 Enterprise Act 2002 s 65(2).

7 le a report under the Enterprise Act 2002 s 61A (see PARA 207). As to OFCOM see PARA 19.

8 Enterprise Act 2002 s 65(2A) (added by the Communications Act 2003 s 389(1), Sch 16 para 15).

9 Enterprise Act 2002 s 65(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/A. SPECIAL PUBLIC INTEREST CASES/212. Decision and enforcement action by the Secretary of State.

## **212. Decision and enforcement action by the Secretary of State.**

Where the Secretary of State<sup>1</sup> has received a report of the Competition Commission<sup>2</sup> in relation to a special merger situation<sup>3</sup>, the Secretary of State must decide if a special merger situation has been created or is anticipated and, if so, if the creation of that situation operates or may be expected to operate against the public interest<sup>4</sup>.

The Secretary of State must make and publish<sup>5</sup> his decision within the period of 30 days beginning with the receipt of the report of the Commission<sup>6</sup>.

In making his decisions, the Secretary of State must accept the decisions of the report of the Commission<sup>7</sup> as to whether a special merger situation has been created or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation<sup>8</sup>.

Where the Secretary of State has decided that:

- (1) a special merger situation has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation<sup>9</sup>;
- (2) at least one consideration which is mentioned in the special intervention notice<sup>10</sup> concerned is relevant to a consideration of the special merger situation concerned<sup>11</sup>; and
- (3) taking account only of the relevant consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest<sup>12</sup>,

and has so decided, and published his decision<sup>13</sup>, then the Secretary of State may take such action<sup>14</sup> as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the special merger situation concerned<sup>15</sup>.

1 As to the Secretary of State see PARA 5.

2 le under the Enterprise Act 2002 s 65 (see PARA 211). As to the Competition Commission see PARAS 9-12.

- 3 Enterprise Act 2002 s 66(1). As to the meaning of 'special merger situation' see PARA 204.
- 4 Enterprise Act 2002 s 66(2). The Secretary of State must decide the questions which the Commission is required to decide by virtue of s 63(1)-(3) (see PARA 209).
- 5 As to the meaning of 'publish' see PARA 186 note 2.
- 6 Enterprise Act 2002 s 66(3). In determining the period of 30 days no account is to be taken of Saturday, Sunday, Good Friday and Christmas Day and any day which is a bank holiday in England and Wales: ss 54(8), 66(3).
- 7 le under the Enterprise Act 2002 s 65 (see PARA 211).
- 8 Enterprise Act 2002 s 66(4).
- 9 Enterprise Act 2002 s 66(5)(a).
- 10 As to the meaning of 'special intervention notice' see PARA 204.
- 11 Enterprise Act 2002 s 66(5)(b).
- 12 Enterprise Act 2002 s 66(5)(c).
- 13 le within the period required by the Enterprise Act 2002 s 66(3) (see the text and notes 5-6).
- 14 le under the Enterprise Act 2002 Sch 7 para 9 or 11 (see PARA 231).
- 15 Enterprise Act 2002 s 66(6). In making a decision under s 66(6), the Secretary of State, in particular, must have regard to the report of the Commission under s 65 (see PARA 211): s 66(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/B. EUROPEAN MERGERS/213. Intervention to protect legitimate interests.

## ***B. EUROPEAN MERGERS***

### **213. Intervention to protect legitimate interests.**

Where (1) the Secretary of State<sup>1</sup> has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation<sup>2</sup> has been created or that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>3</sup>, and a concentration with a Community dimension<sup>4</sup>, or a part of such a concentration, has thereby arisen or will thereby arise<sup>5</sup>; (2) a reference is prevented from being made<sup>6</sup> in relation to the relevant merger situation concerned (whether or not there would otherwise have been a duty to make such a reference) by virtue of Community law or anything done under or in accordance with it<sup>7</sup>; and (3) the Secretary of State is considering whether to take appropriate measures to protect legitimate interests<sup>8</sup>, then the Secretary of State may give a European intervention notice to the Office of Fair Trading (the 'OFT')<sup>9</sup> if he believes that it is or may be the case that one or more than one public interest consideration<sup>10</sup> is relevant to a consideration of the relevant merger situation concerned<sup>11</sup>.

A European intervention notice must state the relevant merger situation concerned, the public interest consideration or considerations which are, or may be, relevant to a consideration of the relevant merger situation concerned and, where any public interest consideration concerned is not finalised<sup>12</sup>, the proposed timetable for finalising it<sup>13</sup>.

Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to a consideration of the relevant merger situation



concerned, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate<sup>14</sup>.

1 As to the Secretary of State see PARA 5.

2 As to the meaning of 'relevant merger situation' see PARA 173.

3 For the purposes of deciding whether a relevant merger situation has been created or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation, the Enterprise Act 2002 ss 23-32 (read together with s 34) (see PARAS 173-182) apply for the purposes of s 67 as they do for the purposes of Pt 3 Ch 1 (ss 22-41), subject to certain modifications: see s 67(7), (8).

4 A concentration has a Community dimension where: (1) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5000 million; and (2) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state; and a concentration that does not meet these thresholds has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million; (b) in each of at least three member states, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; (c) in each of at least three member states included for the purpose of head (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and (d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state: see EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') art 1(2), (3); definition applied by the Enterprise Act 2002 s 67(1)(a)(ii). As to the EC Merger Regulation see further PARA 74.

5 Enterprise Act 2002 s 67(1)(a) (amended by SI 2004/1079).

6 Ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

7 Enterprise Act 2002 s 67(1)(b) (amended by the Communications Act 2003 ss 389(1), 406(7), Sch 16 para 16, Sch 19(1)).

8 Enterprise Act 2002 s 67(1)(c) (amended by SI 2004/1079). The protection of legitimate interests is as permitted by the EC Merger Regulation art 21(4) (see PARA 74).

9 As to the OFT see PARAS 6-8.

10 As to the meaning of 'public interest consideration' see PARA 189 note 10; definition applied by the Enterprise Act 2002 s 67(9).

11 Enterprise Act 2002 s 67(2). No more than one European intervention notice may be given in relation to the same relevant merger situation: s 67(5).

12 As to the meaning of 'public interest consideration being finalised' see PARA 189 note 13.

13 Enterprise Act 2002 s 67(3). Where the Secretary of State has given a European intervention notice mentioning a public interest consideration which, at that time, is not finalised, he must, as soon as practicable, take such action as is within his power to ensure that it is finalised: s 67(6).

14 Enterprise Act 2002 s 67(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iii) Other Special Cases/B. EUROPEAN MERGERS/214. Scheme for protecting legitimate interests.

## **214. Scheme for protecting legitimate interests.**

The Secretary of State<sup>1</sup> may by order provide for the taking of action, where a European intervention notice<sup>2</sup> has been given, to remedy, mitigate or prevent effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of a European relevant merger situation<sup>3</sup>.

A European relevant merger situation is a relevant merger situation<sup>4</sup>:

- (1) which has been created or will be created if arrangements which are in progress or in contemplation are carried into effect<sup>5</sup>;
- (2) by virtue of which a concentration with a Community dimension<sup>6</sup>, or a part of such a concentration, has arisen or will arise<sup>7</sup>; and
- (3) in relation to which a reference was prevented from being made<sup>8</sup> (whether or not there would otherwise have been a duty to make such a reference) by virtue of Community law or anything done under or in accordance with it<sup>9</sup>.

Provision made by the Secretary of State must include provision ensuring that considerations which are not public interest considerations<sup>10</sup> mentioned in the European intervention notice concerned may not be taken into account in determining whether anything operates, or may be expected to operate, against the public interest<sup>11</sup>. Provision must also be made for: (a) applying with modifications the statutory provisions relating to the duty to make references<sup>12</sup> for the purposes of deciding whether a relevant merger situation has been created or whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>13</sup>; (b) requiring the Office of Fair Trading (the 'OFT')<sup>14</sup> to make a report to the Secretary of State before a reference is made<sup>15</sup>; (c) enabling the Secretary of State to make a reference to the Competition Commission<sup>16</sup>; (d) requiring the Commission to investigate and report to the Secretary of State on such a reference<sup>17</sup>; and (e) enabling the taking of interim and final enforcement action<sup>18</sup>.

An order may include provision (including provision for the creation of offences and penalties, the payment of fees and the delegation of functions) corresponding to any provision made in, or in connection with, intervention notices<sup>19</sup> or special intervention notices<sup>20</sup> and the cases to which they relate<sup>21</sup>.

1 As to the Secretary of State see PARA 5.

2 See PARA 213.

3 Enterprise Act 2002 s 68(1). In exercise of this power, the Secretary of State has made the Enterprise Act 2002 (Protection of Legitimate Interests) Order 2003, SI 2003/1592.

4 As to the meaning of 'relevant merger situation' see PARA 173.

5 Enterprise Act 2002 s 68(2)(a).

6 See PARA 213 note 4; definition applied by the Enterprise Act 2002 s 68(2)(b) (amended by SI 2004/1079).

7 Enterprise Act 2002 s 68(2)(b) (as amended: see note 6).

8 Ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

9 Enterprise Act 2002 s 68(2)(c) (amended by the Communications Act 2003 s 389(1), Sch 16 para 17(b)).

10 As to the meaning of 'public interest consideration' see PARA 189 note 10.

11 Enterprise Act 2002 s 68(3).

12 Ie the Enterprise Act 2002 ss 23-32 (see PARAS 173-181).

13 Enterprise Act 2002 s 68(4)(a).

- 14 As to the OFT see PARAS 6-8.
- 15 Enterprise Act 2002 s 68(4)(b).
- 16 Enterprise Act 2002 s 68(4)(c). As to the Competition Commission see PARAS 9-12.
- 17 Enterprise Act 2002 s 68(4)(d).
- 18 Enterprise Act 2002 s 68(4)(e).
- 19 As to the meaning of 'intervention notice' see PARA 189 note 11.
- 20 As to the meaning of 'special intervention notice' see PARA 204.
- 21 Enterprise Act 2002 s 68(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/A. POWERS EXERCISABLE BEFORE REFERENCES/215. Initial undertakings in relation to completed mergers.

#### **(iv) Enforcement**

##### **A. POWERS EXERCISABLE BEFORE REFERENCES**

##### **215. Initial undertakings in relation to completed mergers.**

Where the Office of Fair Trading (the 'OFT')<sup>1</sup> is considering whether to make a reference of a completed merger<sup>2</sup>, the OFT may, for the purpose of preventing pre-emptive action<sup>3</sup>, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate<sup>4</sup>. No undertaking may be accepted unless the OFT has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation<sup>5</sup> has been created<sup>6</sup>.

An undertaking comes into force when accepted<sup>7</sup>. It may be varied or superseded by another undertaking<sup>8</sup> and it may be released by the OFT<sup>9</sup>.

An undertaking which is in force in relation to a possible reference or reference of a completed merger and which has not been adopted<sup>10</sup> ceases to be in force if an initial enforcement order<sup>11</sup> or an interim order<sup>12</sup> comes into force in relation to that reference or an order in relation to public interest cases<sup>13</sup> comes into force in relation to the matter<sup>14</sup>. An undertaking, if it has not previously ceased to be in force and if it has not been adopted<sup>15</sup>, ceases to be in force: (1) where the OFT has decided to make the merger reference concerned<sup>16</sup>, at the end of the period of seven days beginning with the making of the reference<sup>17</sup>; (2) where the OFT has decided to accept an undertaking<sup>18</sup> instead of making that reference, on the acceptance of that undertaking<sup>19</sup>; (3) where an intervention notice is in force, at the end of the period of seven days beginning with the giving of that notice<sup>20</sup>; and (4) where the OFT has otherwise decided not to make the merger reference concerned, on the making of that decision<sup>21</sup>.

The OFT, as soon as reasonably practicable, must consider any representations received by it in relation to varying or releasing an undertaking<sup>22</sup>.

- 1 As to the OFT see PARAS 6-8.
- 2 Ie under the Enterprise Act 2002 s 22 (see PARA 172).

3 'Pre-emptive action' means action which might prejudice the reference concerned or impede the taking of any action under the Enterprise Act 2002 Pt 3 (ss 22-130) which may be justified by the Competition Commission's decisions on the reference: s 71(8). As to the meaning of 'action' see PARA 184 note 9. As to the Competition Commission see PARAS 9-12.

4 Enterprise Act 2002 s 71(1), (2). The provision which may be contained in an enforcement undertaking is not limited to the provision which is permitted by Sch 8 (see PARA 232): s 89(1). In Pt 3, 'enforcement undertaking' means an undertaking under s 71, s 73 (see PARA 217), s 80 (see PARA 223) or s 82 (see PARA 225) or under Sch 7 para 1, 3 or 9 (see PARAS 228-229, 231): s 89(2).

5 As to the meaning of 'relevant merger situation' see PARA 173.

6 Enterprise Act 2002 s 71(3).

7 Enterprise Act 2002 s 71(4)(a).

8 Enterprise Act 2002 s 71(4)(b).

9 Enterprise Act 2002 s 71(4)(c).

10 le under the Enterprise Act 2002 s 80 (see PARA 223) or Sch 7 para 1 (see PARA 228).

11 le an order under the Enterprise Act 2002 s 72 (see PARA 216).

12 le an order under the Enterprise Act 2002 s 81 (see PARA 224).

13 le an order under the Enterprise Act 2002 Sch 7 para 2 (see PARA 228).

14 Enterprise Act 2002 s 71(5).

15 See note 10.

16 le a reference under the Enterprise Act 2002 s 22 (see PARA 172).

17 Enterprise Act 2002 s 71(6)(a).

18 le under the Enterprise Act 2002 s 73 (see PARA 217).

19 Enterprise Act 2002 s 71(6)(b).

20 Enterprise Act 2002 s 71(6)(c).

21 Enterprise Act 2002 s 71(6)(d).

22 Enterprise Act 2002 s 71(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/A. POWERS EXERCISABLE BEFORE REFERENCES/216. Initial enforcement orders in relation to completed mergers.

## **216. Initial enforcement orders in relation to completed mergers.**

Where the Office of Fair Trading (the 'OFT')<sup>1</sup> is considering whether to make a reference of a completed merger<sup>2</sup>, the OFT may by order, for the purpose of preventing pre-emptive action<sup>3</sup>:

(1) prohibit or restrict the doing of things which the OFT considers would constitute pre-emptive action<sup>4</sup>;

(2) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets<sup>5</sup>;

- (3) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner<sup>6</sup>;
- (4) require any person to supply information to the relevant authority or to the OFT and provide for the publication of that information, by the person who has received it<sup>7</sup>.

No order may be made unless the OFT has reasonable grounds for suspecting that it is or may be the case that a relevant merger situation<sup>8</sup> has been created and pre-emptive action is in progress or in contemplation<sup>9</sup>.

An order comes into force at such time as is determined by or under the order and may be varied or revoked by another order<sup>10</sup>.

An order which is in force in relation to a possible reference or a merger reference<sup>11</sup> and has not been adopted<sup>12</sup> ceases to be in force if an undertaking<sup>13</sup> comes into force in relation to that reference or in relation to the matter<sup>14</sup>.

An order, if it has not previously ceased to be in force and if it is not adopted<sup>15</sup>, ceases to be in force: (a) where the OFT has decided to make the merger reference concerned<sup>16</sup>, at the end of the period of seven days beginning with the making of the reference<sup>17</sup>; (b) where the OFT has decided to accept an undertaking<sup>18</sup> instead of making that reference, on the acceptance of that undertaking<sup>19</sup>; (c) where an intervention notice<sup>20</sup> is in force, at the end of the period of seven days beginning with the giving of that notice<sup>21</sup>; and (d) where the OFT has otherwise decided not to make the merger reference concerned, on the making of that decision<sup>22</sup>.

The OFT, as soon as reasonably practicable, must consider any representations received by it in relation to varying or revoking such an order<sup>23</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie under the Enterprise Act 2002 s 22 (see PARA 172).

3 Enterprise Act 2002 s 72(1), (2). As to the meaning of 'pre-emptive action' see PARA 215 note 3.

4 Enterprise Act 2002 s 72(2)(a).

5 Enterprise Act 2002 s 72(2)(b).

6 Enterprise Act 2002 s 72(2)(c).

7 Enterprise Act 2002 s 72(2)(d), Sch 8 para 19.

8 As to the meaning of 'relevant merger situation' see PARA 173.

9 Enterprise Act 2002 s 72(3).

10 Enterprise Act 2002 s 72(4).

11 Ie under the Enterprise Act 2002 s 22 (see PARA 172).

12 Ie under the Enterprise Act 2002 s 81 (see PARA 224) or Sch 7 para 2 (see PARA 228).

13 Ie an undertaking under the Enterprise Act 2002 s 71 (see PARA 215), s 80 (see PARA 223) or Sch 7 para 2 (see PARA 228).

14 Enterprise Act 2002 s 72(5).

15 See note 12.

16 Ie under the Enterprise Act 2002 s 22 (see PARA 172).

- 17 Enterprise Act 2002 s 72(6)(a).
- 18 ie under the Enterprise Act 2002 s 73 (see PARA 217).
- 19 Enterprise Act 2002 s 72(6)(b).
- 20 As to the meaning of 'intervention notice' see PARA 189 note 11.
- 21 Enterprise Act 2002 s 72(6)(c).
- 22 Enterprise Act 2002 s 72(6)(d).
- 23 Enterprise Act 2002 s 72(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/A. POWERS EXERCISABLE BEFORE REFERENCES/217. Undertakings in lieu of references.

## **217. Undertakings in lieu of references.**

If the Office of Fair Trading (the 'OFT')<sup>1</sup> considers that it is under a duty to make a merger reference<sup>2</sup> it may, instead of making such a reference and for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned or any adverse effect which has or may have resulted from it or may be expected to result from it, accept from such of the parties concerned as it considers appropriate undertakings to take such action<sup>3</sup> as it considers appropriate<sup>4</sup>.

In proceeding in this way, the OFT, in particular, must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it<sup>5</sup>. The OFT may, in particular, have regard to the effect of any action on any relevant customer benefits<sup>6</sup> in relation to the creation of the relevant merger situation<sup>7</sup> concerned<sup>8</sup>.

An undertaking comes into force when accepted<sup>9</sup>. It may be varied or superseded by another undertaking<sup>10</sup> and may be released by the OFT<sup>11</sup>. An undertaking which is in force in relation to a relevant merger situation ceases to be in force if an order comes into force<sup>12</sup> in relation to that undertaking<sup>13</sup>.

The OFT, as soon as reasonably practicable, must consider any representations received by it in relation to varying or releasing an undertaking<sup>14</sup>.

- 1 As to the OFT see PARAS 6-8.
- 2 ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182). The operation of s 22(3)(b) or (as the case may be) s 33(3)(b) must be disregarded but account must be taken of the power of the OFT under s 22(2) or (as the case may be) s 33(2) to decide not to make such a reference: s 73(1).
- 3 As to the meaning of 'action' see PARA 184 note 9.
- 4 Enterprise Act 2002 s 73(1), (2).
- 5 Enterprise Act 2002 s 73(3).
- 6 As to the meaning of 'relevant customer benefit' see PARA 180.
- 7 As to the meaning of 'relevant merger situation' see PARA 173.

- 8 Enterprise Act 2002 s 73(4).
- 9 Enterprise Act 2002 s 73(5)(a).
- 10 Enterprise Act 2002 s 73(5)(b).
- 11 Enterprise Act 2002 s 73(5)(c).
- 12 le under the Enterprise Act 2002 s 75 (see PARA 219) or s 76 (see PARA 220).
- 13 Enterprise Act 2002 s 73(6).
- 14 Enterprise Act 2002 s 73(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/A. POWERS EXERCISABLE BEFORE REFERENCES/218. Effect of undertakings.

## **218. Effect of undertakings.**

The relevant authority<sup>1</sup> is not permitted to make a reference<sup>2</sup> in relation to the creation of a relevant merger situation<sup>3</sup> if the Office of Fair Trading (the 'OFT') has accepted an undertaking or group of undertakings<sup>4</sup> and the relevant merger situation is the situation by reference to which the undertaking or group of undertakings was accepted<sup>5</sup>.

The making of a reference is not prevented if material facts about relevant arrangements or transactions, or relevant proposed arrangements or transactions<sup>6</sup>, were not notified, whether in writing or otherwise, to the OFT or made public<sup>7</sup> before any undertaking concerned was accepted<sup>8</sup>.

1 'Relevant authority' means: (1) in relation to a possible reference under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182), the Office of Fair Trading (the 'OFT'); and (2) in relation to a possible reference under s 45 (see PARA 193), the Secretary of State: s 74(5). As to the OFT see PARAS 6-8. As to the Secretary of State see PARA 5.

2 le a reference under the Enterprise Act 2002 under s 22 (see PARA 172), s 33 (see PARA 182) or s 45 (see PARA 193).

3 As to the meaning of 'relevant merger situation' see PARA 173.

4 le under the Enterprise Act 2002 s 73 (see PARA 217).

5 Enterprise Act 2002 s 74(1).

6 Arrangements or transactions, or proposed arrangements or transactions, are relevant if they are the ones in consequence of which the enterprises concerned ceased or may have ceased, or may cease, to be distinct enterprises: Enterprise Act 2002 s 74(3). As to the meaning of 'enterprise' see PARA 173 note 2. As to enterprises ceasing to be distinct enterprises see PARA 176.

7 'Made public' means so publicised as to be generally known or readily ascertainable: Enterprise Act 2002 s 74(4).

8 Enterprise Act 2002 s 74(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/A. POWERS EXERCISABLE BEFORE REFERENCES/219. Order-making powers where undertakings not fulfilled.

## **219. Order-making powers where undertakings not fulfilled.**

Where the Office of Fair Trading (the 'OFT')<sup>1</sup> considers that an undertaking accepted by it<sup>2</sup> has not been, is not being or will not be fulfilled<sup>3</sup> or, in relation to an undertaking accepted by it, information which was false or misleading in a material respect was given to the OFT by the person giving the undertaking before the OFT decided to accept the undertaking<sup>4</sup>, then the OFT may, for the purpose of remedying, mitigating or preventing the substantial lessening of competition<sup>5</sup>, make an order<sup>6</sup>. In making such an order, the OFT, in particular, must have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it and may have regard to the effect of any action<sup>7</sup> on any relevant customer benefits<sup>8</sup> in relation to the creation of the relevant merger situation<sup>9</sup> concerned<sup>10</sup>.

An order may contain anything permitted by an enforcement order<sup>11</sup> and such supplementary, consequential or incidental provision as the OFT considers appropriate<sup>12</sup>. An order comes into force at such time as is determined by or under the order<sup>13</sup>. It may contain provision which is different from the provision contained in the undertaking concerned<sup>14</sup> and may be varied or revoked by another order<sup>15</sup>. The OFT, as soon as reasonably practicable, must consider any representations received by it in relation to varying or revoking an order<sup>16</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie under the Enterprise Act 2002 s 73 (see PARA 217).

3 Enterprise Act 2002 s 75(1)(a).

4 Enterprise Act 2002 s 75(1)(b).

5 Ie for any of the purposes mentioned in the Enterprise Act 2002 s 73(2) (see PARA 217).

6 Enterprise Act 2002 s 75(2).

7 As to the meaning of 'action' see PARA 184 note 9.

8 As to the meaning of 'relevant customer benefit' see PARA 180.

9 As to the meaning of 'relevant merger situation' see PARA 173.

10 Enterprise Act 2002 s 75(3), applying s 73(3), (4).

11 Ie anything permitted by the Enterprise Act 2002 Sch 8 (see PARA 232).

12 Enterprise Act 2002 s 75(4). The order or any explanatory material accompanying the order must state: (1) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing; (2) the date on which the order comes into force; (3) the possible consequences of not complying with the order; and (4) the statutory provision under which a review can be sought in relation to the order: s 88(1), (2).

13 Enterprise Act 2002 s 75(5)(a).

14 Enterprise Act 2002 s 75(5)(b).

15 Enterprise Act 2002 s 75(5)(c).

16 Enterprise Act 2002 s 75(6).



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/A. POWERS EXERCISABLE BEFORE REFERENCES/220. Supplementary interim order-making power.

## **220. Supplementary interim order-making power.**

Where the Office of Fair Trading (the 'OFT')<sup>1</sup> or the Competition Commission<sup>2</sup> has the power<sup>3</sup> in relation to a particular undertaking to make an order because undertakings have not been fulfilled and it intends to make such an order<sup>4</sup>, then the OFT or (as the case may be) the Commission may, for the purpose of preventing any action<sup>5</sup> which might prejudice the making of that order, make an interim order<sup>6</sup>. However, no such interim order<sup>7</sup> may be made unless the OFT or (as the case may be) the Commission has reasonable grounds for suspecting that it is or may be the case that action which might prejudice the making of the original order<sup>8</sup> is in progress or in contemplation<sup>9</sup>.

An interim order may:

- (1) prohibit or restrict the doing of things which the OFT or (as the case may be) the Commission considers would prejudice the making of the original order<sup>10</sup>;
- (2) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets<sup>11</sup>;
- (3) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner<sup>12</sup>;
- (4) require any person to supply information to the relevant authority (and where the OFT is not the relevant authority, to the OFT itself) and provide for the publication of that information<sup>13</sup>.

An interim order comes into force at such time as is determined by or under the order<sup>14</sup>. It may be varied or revoked by another order<sup>15</sup>, and the OFT or (as the case may be) the Commission must consider any representations received by it in relation to varying or revoking an interim order as soon as reasonably practicable<sup>16</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Competition Commission see PARAS 9-12.

3 Ie where the OFT has power to make an order under the Enterprise Act 2002 s 75 (see PARA 219) or where the Commission has power to make an order under s 83 (see PARA 225).

4 Enterprise Act 2002 s 76(1).

5 As to the meaning of 'action' see PARA 184 note 9.

6 Enterprise Act 2002 s 76(2).

7 Ie under the Enterprise Act 2002 s 76(2).

8 Ie the order made under the Enterprise Act 2002 s 75 or s 83 as the case may be.

9 Enterprise Act 2002 s 76(3).

10 Enterprise Act 2002 s 76(4)(a). See note 8.

11 Enterprise Act 2002 s 76(4)(b).

- 12 Enterprise Act 2002 s 76(4)(c).
- 13 Enterprise Act 2002 ss 76(4)(d), Sch 8 para 19.
- 14 Enterprise Act 2002 s 76(5)(a). An order under s 76(2), if it has not previously ceased to be in force, ceases to be in force on (1) the coming into force of an order under s 75 or (as the case may be) s 83 in relation to the undertaking concerned; or (2) the making of the decision not to proceed with such an order: s 76(6).
- 15 Enterprise Act 2002 s 76(5)(b).
- 16 Enterprise Act 2002 s 76(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/B. INTERIM RESTRICTIONS AND POWERS/221. Restrictions on certain dealings in relation to completed mergers.

## ***B. INTERIM RESTRICTIONS AND POWERS***

### **221. Restrictions on certain dealings in relation to completed mergers.**

Where a reference has been made in relation to a completed merger<sup>1</sup> by the Office of Fair Trading (the 'OFT')<sup>2</sup> to the Competition Commission<sup>3</sup> but has not been finally determined<sup>4</sup>, and no undertakings to prevent pre-emptive action<sup>5</sup> are in force in relation to the relevant merger situation<sup>6</sup> concerned and no initial enforcement orders<sup>7</sup> are in force in relation to that situation, there are restrictions on certain dealings<sup>8</sup>.

In particular, no relevant person<sup>9</sup> may, without the consent of the Commission<sup>10</sup> (1) complete any outstanding matters in connection with any arrangements which have resulted in the enterprises<sup>11</sup> concerned ceasing to be distinct enterprises<sup>12</sup>; (2) make any further arrangements in consequence of that result (other than arrangements which reverse that result)<sup>13</sup>; or (3) transfer the ownership or control of any enterprises to which the reference relates<sup>14</sup>. No relevant person may, without the consent of the Commission, assist in any of the activities mentioned in heads (1) to (3)<sup>15</sup>. However, these prohibitions<sup>16</sup> do not apply in relation to anything which the person concerned is required to do by virtue of any enactment<sup>17</sup>.

The prohibitions described above<sup>18</sup> apply to a person's conduct outside the United Kingdom<sup>19</sup> if (and only if) he is (a) a United Kingdom national; (b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or (c) a person carrying on business in the United Kingdom<sup>20</sup>.

1 le under the Enterprise Act 2002 s 22 (see PARA 172).

2 As to the OFT see PARAS 6-8.

3 As to the Competition Commission see PARAS 9-12.

4 The time when a reference under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182) is finally determined is as follows: (1) if the reference is cancelled under s 37(1) (see PARA 185), it is the making of the decision concerned (see s 79(1)(a), (2)(a)); (2) if the time within which the Commission is to prepare and publish a report under s 38 (see PARA 186) in relation to the reference has expired and no such report has been prepared and published, then it is the expiry of the time concerned (s 79(1)(b), (2)(b)); (3) if the report of the Commission under s 38 contains the decision that there is not an anti-competitive outcome, then it is the publication of the report (s 79(1)(c), (2)(c)); (4) if the report of the Commission under s 38 contains the decision that there is an anti-competitive outcome and the Commission has decided under s 41(2) (see PARA 188) neither to accept an undertaking under s 82 (see PARA 225) nor to make an order under s 84 (see PARA 226), then it is the making of the decision under s 41(2) (s 79(1)(d), (2)(d)); (5) if the report of the Commission under s 38

contains the decision that there is an anti-competitive outcome and the Commission has decided under s 41(2) to accept an undertaking under s 82 or to make an order under s 84, then it is the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned (s 79(1)(e), (2)(e)).

5       le undertakings under the Enterprise Act 2002 s 71 (see PARA 215) or s 80 (see PARA 223).

6       As to the meaning of 'relevant merger situation' see PARA 173.

7       le orders under the Enterprise Act 2002 s 72 (see PARA 216) or s 81 (see PARA 224).

8       Enterprise Act 2002 s 77(1).

9       For these purposes, 'relevant person' means: (1) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise; (2) any subsidiary of any person falling within head (1); or (3) any person associated with any person falling within head (1) or any subsidiary of any person so associated: Enterprise Act 2002 s 77(8).

10       The consent of the Commission under the Enterprise Act 2002 s 77(2) or s 77(3) may be general or special and may be revoked by the Commission: s 77(5)(a)(b). The consent must be published in such manner as the Commission considers appropriate for the purpose of bringing it to the attention of any person entitled to the benefit of it (s 77(5)(c)), but this does not apply if the Commission considers that publication is not necessary for that purpose (s 77(6)).

11       As to the meaning of 'enterprise' see PARA 173 note 2.

12       Enterprise Act 2002 s 77(2)(a). As to enterprises ceasing to be distinct see PARA 176.

13       Enterprise Act 2002 s 77(2)(b).

14       Enterprise Act 2002 s 77(2)(c). A reference to a person carrying on or having control of any enterprise includes a group of persons carrying on or having control of an enterprise and any member of such a group: s 79(7). Sections 26(2)-(4), 127(1), (2), (4)-(6) (see PARA 176) apply for the purposes of s 77 to determine whether any person or group of persons has control of any enterprise and whether persons are associated as they apply for the purposes of s 26 to determine whether enterprises are brought under common control: s 79(8). As to whether a company is a subsidiary of an individual or of a group of persons see the Companies Act 2006 ss 1159, 1160 (see **COMPANIES** vol 14 (2009) PARA 25); applied by the Enterprise Act 2002 s 79(9); Companies Act 2006 s 1297.

15       Enterprise Act 2002 s 77(3). As to the consent of the Commission see note 10.

16       le those prohibitions in the Enterprise Act 2002 s 77(2), (3): see the text and notes 9-15.

17       Enterprise Act 2002 s 77(4).

18       See note 16.

19       As to the meaning of 'United Kingdom' see PARA 401 note 1.

20       Enterprise Act 2002 s 77(7).

## **UPDATE**

### **221 Restrictions on certain dealings in relation to completed mergers**

NOTE 14--Enterprise Act 2002 s 77(9) amended: SI 2009/1941.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/B. INTERIM RESTRICTIONS AND POWERS/222. Restrictions on certain share dealings in relation to anticipated mergers.

### **222. Restrictions on certain share dealings in relation to anticipated mergers.**

Where a reference has been made<sup>1</sup> by the Office of Fair Trading (the 'OFT')<sup>2</sup> to the Competition Commission<sup>3</sup> in relation to an anticipated merger and no undertakings to prevent pre-emptive action<sup>4</sup> are in force in relation to the relevant merger situation<sup>5</sup> concerned and no initial enforcement orders<sup>6</sup> are in force in relation to that situation, there are restrictions on certain dealings<sup>7</sup>.

No relevant person<sup>8</sup> may, without the consent of the Commission<sup>9</sup>, directly or indirectly acquire during the relevant period<sup>10</sup> an interest in shares in a company<sup>11</sup> if any enterprise<sup>12</sup> to which the reference relates is carried on by or under the control of that company<sup>13</sup>.

This prohibition applies to a person's conduct outside the United Kingdom<sup>14</sup> if (and only if) he is (1) a United Kingdom national; (2) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom; or (3) a person carrying on business in the United Kingdom<sup>15</sup>.

1      Ie under the Enterprise Act 2002 s 33 (see PARA 182).

2      As to the OFT see PARAS 6-8.

3      As to the Competition Commission see PARAS 9-12.

4      Ie undertakings under the Enterprise Act 2002 s 80 (see PARA 223).

5      As to the meaning of 'relevant merger situation' see PARA 173.

6      Ie orders under the Enterprise Act 2002 s 81 (see PARA 224).

7      Enterprise Act 2002 s 78(1).

8      For these purposes, 'relevant person' means: (1) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise; (2) any subsidiary of any person falling within head (1); or (3) any person associated with any person falling within head (1) or any subsidiary of any person so associated: Enterprise Act 2002 s 78(6).

9      The consent of the Commission under the Enterprise Act 2002 s 78(2) may be general or special and may be revoked by the Commission: s 78(3)(a), (b). The consent must be published in such manner as the Commission considers appropriate for bringing it to the attention of any person entitled to the benefit of it (s 78(3)(c)), but this does not apply if the Commission considers that publication is not necessary for that purpose (s 78(4)).

10     'Relevant period' means the period beginning with the making of the reference concerned and ending when the reference is finally determined: Enterprise Act 2002 s 78(6). As to when a reference under s 33 is finally determined see PARA 221 note 4.

11     The circumstances in which a person acquires an interest in shares include those where: (1) he enters into a contract to acquire the shares (whether or not for cash); (2) he is not the registered holder but acquires the right to exercise, or to control the exercise of, any right conferred by the holding of the shares; or (3) he either acquires a right to call for delivery of the shares to himself or to his order or to acquire an interest in the shares, or he assumes an obligation to acquire such an interest: Enterprise Act 2002 s 79(3). The circumstances in which a person acquires a right mentioned in heads (1)-(3) include those where he acquires a right, or assumes an obligation, whose exercise or fulfilment would give him that right (s 79(5)(a)), but they do not include those where he is appointed as proxy to vote at a specified meeting of a company or of any class of its members or at any adjournment of the meeting or he is appointed by a corporation to act as its representative at any meeting of the company or of any class of its members (s 79(5)(b)). The circumstances in which a person acquires an interest in shares do not, however, include those where he acquires an interest in pursuance of an obligation assumed before the publication by the OFT of the reference concerned: s 79(4). The references to rights and obligations in s 79(3)-(5) include conditional rights and conditional obligations: s 79(6). 'Company' includes any body corporate; and 'share' means share in the capital of a company, and includes stock: s 78(6).

12     As to the meaning of 'enterprise' see PARA 173 note 2.

13     Enterprise Act 2002 s 78(2). A reference to a person carrying on or having control of any enterprise includes a group of persons carrying on or having control of an enterprise and any member of such a group: s

79(7). Sections 26(2)-(4), 127(1), (2), (4)-(6) (see PARAS 176) apply for the purposes of s 77 to determine whether any person or group of persons has control of any enterprise and whether persons are associated as they apply for the purposes of s 26 to determine whether enterprises are brought under common control: s 79(8). As to whether a company is a subsidiary of an individual or of a group of persons see the Companies Act 2006 ss 1159, 1160 (see **COMPANIES** vol 14 (2009) PARA 25); applied by the Enterprise Act 2002 s 79(9); Companies Act 2006 s 1297.

14 As to the meaning of 'United Kingdom' see PARA 401 note 1.

15 Enterprise Act 2002 s 78(5).

## UPDATE

### **222 Restrictions on certain share dealings in relation to anticipated mergers**

NOTE 13--Enterprise Act 2002 s 77(9) amended: SI 2009/1941.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/B. INTERIM RESTRICTIONS AND POWERS/223. Interim undertakings.

### **223. Interim undertakings.**

Where a reference has been made by the Office of Fair Trading (the 'OFT')<sup>1</sup> to the Competition Commission<sup>2</sup> in relation to a completed merger<sup>3</sup> or an anticipated merger<sup>4</sup> but is not finally determined<sup>5</sup>, then the Commission may, for the purpose of preventing pre-emptive action<sup>6</sup>, accept from such of the parties concerned as it considers appropriate undertakings to take such action as it considers appropriate<sup>7</sup>. The Commission may also, for the purpose of preventing pre-emptive action, adopt an initial undertaking in relation to a completed merger accepted by the OFT<sup>8</sup> if the undertaking is still in force when the Commission adopts it<sup>9</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Competition Commission see PARAS 9-12.

3 Ie a reference under the Enterprise Act 2002 s 22 (see PARA 172).

4 Ie a reference under the Enterprise Act 2002 s 33 (see PARA 182).

5 As to when a reference under s 22 or s 33 is finally determined see PARA 221 note 4.

6 For the purposes of the Enterprise Act 2002 ss 80, 81, 'pre-emptive action' means action which might prejudice the reference concerned or impede the taking of any action under Pt 3 (ss 22-130) which may be justified by the Commission's decisions on the reference: s 80(10). As to the meaning of 'action' see PARA 184 note 9.

7 Enterprise Act 2002 s 80(1), (2). As to undertakings see note 9.

8 Ie under the Enterprise Act 2002 s 71 (see PARA 215).

9 Enterprise Act 2002 s 80(3). An undertaking adopted under s 80(3): (1) continues in force, in accordance with its terms, when adopted; (2) may be varied or superseded by an undertaking under s 80; and (3) may be released by the Commission: s 80(4). Any other undertaking under s 80: (a) comes into force when accepted; (b) may be varied or superseded by another undertaking; and (c) may be released by the Commission: s 80(5). References in Pt 3 to undertakings under s 80 include, unless the context otherwise requires, references to undertakings adopted under s 80; and references to the acceptance or giving of undertakings under s 80 are to

be construed accordingly: s 80(6). An undertaking which is in force under s 80 in relation to a reference under s 22 or s 33 ceases to be in force if an order under s 81 (see PARA 224) comes into force in relation to that reference: s 80(7). An undertaking under s 80, if it has not previously ceased to be in force, ceases to be in force when the reference under s 22 or s 33 is finally determined: s 80(8); and see note 5. The Commission must, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under s 80: s 80(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/B. INTERIM RESTRICTIONS AND POWERS/224. Interim orders.

## **224. Interim orders.**

Where a reference has been made by the Office of Fair Trading (the 'OFT')<sup>1</sup> to the Competition Commission<sup>2</sup> in relation to a completed merger<sup>3</sup> or an anticipated merger<sup>4</sup> but is not finally determined<sup>5</sup>, then the Commission may by order, for the purpose of preventing pre-emptive action<sup>6</sup>:

- (1) prohibit or restrict the doing of things which the Commission considers would constitute pre-emptive action<sup>7</sup>;
- (2) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets<sup>8</sup>;
- (3) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner<sup>9</sup>;
- (4) require any person to supply information to the relevant authority (and where the OFT is not the relevant authority, to the OFT itself) and provide for the publication of that information<sup>10</sup>.

The Commission may also, for the purpose of preventing pre-emptive action, adopt an initial enforcement order made by the OFT in relation to a completed merger<sup>11</sup> if the order is still in force when the Commission adopts it<sup>12</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Competition Commission see PARAS 9-12.

3 Ie a reference under the Enterprise Act 2002 s 22 (see PARA 172).

4 Ie a reference under the Enterprise Act 2002 s 33 (see PARA 182).

5 Enterprise Act 2002 s 81(1). As to when a reference under s 22 or s 33 is finally determined see PARA 221 note 4.

6 As to the meaning of 'pre-emptive action' see PARA 223 note 6.

7 Enterprise Act 2002 s 81(2)(a).

8 Enterprise Act 2002 s 81(2)(b).

9 Enterprise Act 2002 s 81(2)(c).

10 Enterprise Act 2002 s 81(2)(d), Sch 8 para 19.

11 le under the Enterprise Act 2002 s 72 (see PARA 216).

12 Enterprise Act 2002 s 81(3). An order adopted under s 81(3): (1) continues in force, in accordance with its terms, when adopted; and (2) may be varied or revoked by an order under s 81: s 81(4). Any other order under s 81: (a) comes into force at such time as is determined by or under the order; and (b) may be varied or revoked by another order: s 81(5). References in Pt 3 to orders under s 81, unless the context otherwise requires, include references to orders adopted under s 81; and references to the making of orders under s 81 are to be construed accordingly: s 81(6). An order which is in force under s 81 in relation to a reference under s 22 or s 33 ceases to be in force if an undertaking under s 80 (see PARA 223) comes into force in relation to that reference: s 81(7). An order under s 81, if it has not previously ceased to be in force, ceases to be in force when the reference under s 22 or s 33 is finally determined: s 81(8); and see note 5. The Commission must, as soon as reasonably practicable, consider any representations received by it in relation to varying or revoking an order under s 81: s 81(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/C. FINAL POWERS/225. Final undertakings.

### **C. FINAL POWERS**

#### **225. Final undertakings.**

Where a report of the Competition Commission<sup>1</sup> has been prepared and published<sup>2</sup> and contains the decision that there is an anti-competitive outcome<sup>3</sup>, the Commission must take such action<sup>4</sup> as it considers to be reasonable and practicable (1) to remedy, mitigate or prevent the substantial lessening of competition concerned; and (2) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition<sup>5</sup>. The Commission may therefore<sup>6</sup>, accept, from such persons as it considers appropriate, undertakings to take action specified or described in the undertakings<sup>7</sup>.

Where the Commission considers that (a) such an undertaking<sup>8</sup> has not been, is not being or will not be fulfilled; or (b) in relation to such an undertaking accepted by it, information which was false or misleading in a material respect was given to the Commission or the Office of Fair Trading (the 'OFT')<sup>9</sup> by the person giving the undertaking before the Commission decided to accept the undertaking<sup>10</sup>, then the Commission may make an order<sup>11</sup> to remedy, mitigate or prevent the substantial lessening of competition concerned and to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition<sup>12</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 le under the Enterprise Act 2002 s 38 (see PARA 186) within the period permitted by s 39 (see PARA 187).

3 See the Enterprise Act 2002 s 41(1); and PARA 188.

4 le under the Enterprise Act 2002 s 82 (see notes 6-7) or s 84 (see PARA 226).

5 See the Enterprise Act 2002 s 41(2); and PARA 188.

6 le in accordance with the Enterprise Act 2002 s 41 (see PARA 188).

7 Enterprise Act 2002 s 82(1). An undertaking under s 82: (1) comes into force when accepted; (2) may be varied or superseded by another undertaking; and (3) may be released by the Commission: s 82(2). An undertaking which is in force under s 82 in relation to a reference under s 22 (see PARA 172) or s 33 (see PARA 182) ceases to be in force if an order under s 76(1)(b) (see PARA 220) or s 83 (see the text and notes 8-12) comes into force in relation to the subject-matter of the undertaking: s 82(3). No undertaking may be accepted under s 82 in relation to a reference under s 22 or s 33 if an order has been made under s 76(1)(b) or s 83 in

relation to the subject-matter of the undertaking, or s 84 (see PARA 226) in relation to that reference: s 82(4). The Commission must, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing an undertaking under s 82: s 82(5).

8       le an undertaking accepted by it under the Enterprise Act 2002 s 82: see the text and notes 6-7.

9       As to the OFT see PARAS 6-8.

10       Enterprise Act 2002 s 83(1).

11       An order under the Enterprise Act 2002 s 83 may contain anything permitted by Sch 8 (see PARAS 232-239) as well as such supplementary, consequential or incidental provision as the Commission considers appropriate: s 83(4). The order or any explanatory material accompanying the order must state: (1) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing; (2) the date on which the order comes into force; (3) the possible consequences of not complying with the order; and (4) the statutory provision under which a review can be sought in relation to the order: s 88(1), (2). The order comes into force at such time as is determined by or under the order, and may contain provision which is different from the provision contained in the undertaking concerned: s 83(5)(a), (b). It may be varied or revoked by another order (s 83(5)(c)), but only if the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances (s 83(6)).

12       Enterprise Act 2002 ss 41(2), 83(2). Section 41(3)-(5) (see PARA 188) applies for the purposes of s 83(2) as it applies for the purposes of s 41(2): s 83(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/C. FINAL POWERS/226. Final orders.

## **226. Final orders.**

Where a report of the Competition Commission<sup>1</sup> has been prepared and published<sup>2</sup> and contains the decision that there is an anti-competitive outcome<sup>3</sup>, the Commission must take such action<sup>4</sup> as it considers to be reasonable and practicable (1) to remedy, mitigate or prevent the substantial lessening of competition concerned; and (2) to remedy, mitigate or prevent any adverse effects which have resulted from, or may be expected to result from, the substantial lessening of competition<sup>5</sup>. In these circumstances the Commission may<sup>6</sup> make a final order<sup>7</sup>. However, no such order may be made in relation to a reference in relation to a completed merger<sup>8</sup> or an anticipated merger<sup>9</sup> if a final undertaking has been accepted<sup>10</sup> in relation to that reference<sup>11</sup>.

1       As to the Competition Commission see PARAS 9-12.

2       le under the Enterprise Act 2002 s 38 (see PARA 186) within the period permitted by s 39 (see PARA 187).

3       See the Enterprise Act 2002 s 41(1); and PARA 188.

4       le under the Enterprise Act 2002 s 82 (see PARA 225) or s 84.

5       See the Enterprise Act 2002 s 41(2); and PARA 188.

6       le in accordance with the Enterprise Act 2002 s 41 (see PARA 188).

7       Enterprise Act 2002 s 84(1). An order under s 84 may contain anything permitted by Sch 8 (see PARAS 232-239) as well as such supplementary, consequential or incidental provision as the Commission considers appropriate: s 84(2). The order or any explanatory material accompanying the order must state: (1) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing; (2) the date on which the order comes into force; (3) the possible consequences of not complying with the order; and (4) the statutory provision under which a review can be sought in relation to the order: s 88(1), (2). The order comes into force at such time as is determined by or under the order, and may be varied or revoked by another order: s 84(3). However, no such order may be varied or revoked under s 84



unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances: s 84(4).

- 8      le under the Enterprise Act 2002 s 22 (see PARA 172).
- 9      le under the Enterprise Act 2002 s 33 (see PARA 182).
- 10     le under the Enterprise Act 2002 s 82 (see PARA 225).
- 11     Enterprise Act 2002 s 84(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/D. PUBLIC INTEREST AND SPECIAL PUBLIC INTEREST CASES/227. Enforcement regime for public interest and special public interest cases.

#### ***D. PUBLIC INTEREST AND SPECIAL PUBLIC INTEREST CASES***

##### **227. Enforcement regime for public interest and special public interest cases.**

The Enterprise Act 2002 sets out the enforcement regime for public interest and special public interest cases<sup>1</sup>. The enforcement regime covers pre-emptive undertakings and orders<sup>2</sup>, undertakings in lieu of certain references<sup>3</sup>, the statutory restrictions following those references<sup>4</sup>, and final undertakings and orders<sup>5</sup>. The Office of Fair Trading (the 'OFT')<sup>6</sup> may advise the Secretary of State<sup>7</sup> in relation to the taking by him of such enforcement action<sup>8</sup>.

- 1      The enforcement regime is set out in the Enterprise Act 2002 Sch 7: see s 85(1).
- 2      See the Enterprise Act 2002 Sch 7 paras 1, 2; and PARA 228.
- 3      le undertakings in lieu of references under the Enterprise Act 2002 s 45 (see PARA 193) or s 62 (see PARA 208): see Sch 7 paras 3-6; and PARA 229.
- 4      See the Enterprise Act 2002 Sch 7 paras 7, 8; and PARA 230.
- 5      See the Enterprise Act 2002 Sch 7 paras 9-11; and PARA 231.
- 6      As to the OFT see PARAS 6-8.
- 7      As to the Secretary of State see PARA 5.
- 8      Enterprise Act 2002 s 85(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/D. PUBLIC INTEREST AND SPECIAL PUBLIC INTEREST CASES/228. Enforcement provisions relating to pre-emptive undertakings and orders.

##### **228. Enforcement provisions relating to pre-emptive undertakings and orders.**

Where an intervention notice<sup>1</sup> or a special intervention notice<sup>2</sup> is in force, the Secretary of State<sup>3</sup> may, for the purpose of preventing pre-emptive action<sup>4</sup>, accept from such of the parties

concerned as he considers appropriate undertakings to take such action as he considers appropriate<sup>5</sup>. Where an intervention notice is in force, the Secretary of State may, for the purpose of preventing pre-emptive action, adopt an undertaking accepted by the OFT<sup>6</sup> if the undertaking is still in force when the Secretary of State adopts it<sup>7</sup>.

Where an intervention notice or special intervention notice is in force<sup>8</sup>, the Secretary of State or the OFT may by order, for the purpose of preventing pre-emptive action:

- (1) prohibit or restrict the doing of things which the Secretary of State or (as the case may be) the OFT considers would constitute pre-emptive action<sup>9</sup>;
- (2) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets<sup>10</sup>;
- (3) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner<sup>11</sup>; and
- (4) require any person to supply information to the relevant authority, or (where the OFT is not the relevant authority) require any person to supply information to the OFT, and provide for the publication, by the person who has received such information, of that information<sup>12</sup>.

Where an intervention notice is in force<sup>13</sup>, the Secretary of State or the OFT may, for the purpose of preventing pre-emptive action, adopt an order made by the OFT<sup>14</sup> if the order is still in force when the Secretary of State or (as the case may be) the OFT adopts it<sup>15</sup>.

1 As to the meaning of 'intervention notice' see PARA 189 note 11.

2 As to the meaning of 'special intervention notice' see PARA 204.

3 As to the Secretary of State see PARA 5.

4 For these purposes, 'pre-emptive action' means action which might prejudice the reference or possible reference concerned under the Enterprise Act 2002 s 45 (see PARA 193) or (as the case may be) s 62 (see PARA 208) or impede the taking of any action under Pt 3 which may be justified by the Secretary of State's decisions on the reference: Sch 7 para 1(12).

5 Enterprise Act 2002 Sch 7 para 1(1), (2). See note 7.

6 Ie an undertaking under the Enterprise Act 2002 s 71 (see PARA 215).

7 Enterprise Act 2002 Sch 7 para 1(3), (4). An undertaking adopted under Sch 7 para 1(4) continues in force, in accordance with its terms, when adopted: Sch 7 para 1(5)(a). It may be varied or superseded by an undertaking under Sch 7 para 1 and it may be released by the Secretary of State: Sch 7 para 1(5)(b), (c). Any other undertaking under Sch 7 para 1 comes into force when accepted, and may be varied or superseded by another undertaking, and may be released by the Secretary of State: Sch 7 para 1(6).

References in Pt 3 to undertakings under Sch 7 para 1, unless the context otherwise requires, include references to undertakings adopted under Sch 7 para 1; and references to the acceptance or giving of undertakings under Sch 7 para 1 are to be construed accordingly: Sch 7 para 1(7). An undertaking which is in force under Sch 7 para 1 in relation to a reference or possible reference under s 45 (see PARA 193) or (as the case may be) s 62 (see PARA 208) ceases to be in force if an order under Sch 7 para 2 or an undertaking under Sch 7 para 3 comes into force in relation to that reference: Sch 7 para 1(8). An undertaking under Sch 7 para 1, if it has not previously ceased to be in force, ceases to be in force when the intervention notice concerned or (as the case may be) special intervention notice concerned ceases to be in force: Sch 7 para 1(9).

No undertaking may be accepted by the Secretary of State under Sch 7 para 1 before the making of a reference under s 45 or (as the case may be) s 62 unless the undertaking relates to a relevant merger situation which has been, or may have been, created or (as the case may be) a special merger situation which has been, or may have been, created: Sch 7 para 1(10). As to the meaning of 'relevant merger situation' see PARA 173. The Secretary of State must, as soon as reasonably practicable, consider any representations received by him in relation to varying or releasing an undertaking under Sch 7 para 1: Sch 7 para 1(11).

- 8 Enterprise Act 2002 Sch 7 para 2(1).
- 9 Enterprise Act 2002 Sch 7 para 2(2)(a).
- 10 Enterprise Act 2002 Sch 7 para 2(2)(b).
- 11 Enterprise Act 2002 Sch 7 para 2(2)(c).
- 12 Enterprise Act 2002 Sch 7 para 2(2)(d), Sch 8 para 19; and see PARA 236.
- 13 Enterprise Act 2002 Sch 7 para 2(3).
- 14 le under the Enterprise Act 2002 s 72 (see PARA 216).
- 15 Enterprise Act 2002 Sch 7 para 2(4). An order adopted under Sch 7 para 2(4) continues in force, in accordance with its terms, when adopted, and may be varied or revoked by an order under Sch 7 para 2: Sch 7 para 2(5). Any other order under Sch 7 para 2 comes into force at such time as is determined by or under the order, and may be varied or revoked by another order: Sch 7 para 2(6).
- References in Pt 3 to orders under Sch 7 para 2, unless the context otherwise requires, include references to orders adopted under Sch 7 para 2; and references to the making of orders under Sch 7 para 2 are to be construed accordingly: Sch 7 para 2(7). An order which is in force under Sch 7 para 2 in relation to a reference or possible reference under s 45 or (as the case may be) s 62 ceases to be in force if an undertaking under Sch 7 para 1 or Sch 7 para 3 comes into force in relation to that reference: Sch 7 para (8). An order under Sch 7 para 2, if it has not previously ceased to be in force, ceases to be in force when the intervention notice concerned or (as the case may be) special intervention notice concerned ceases to be in force: Sch 7 para 2(9).
- No order may be made by the Secretary of State or the OFT under Sch 7 para 2 before the making of a reference under s 45 or (as the case may be) s 62 unless the order relates to a relevant merger situation which has been, or may have been, created or (as the case may be) a special merger situation which has been, or may have been, created: Sch 7 para 2(10). The Secretary of State or (as the case may be) the OFT must, as soon as reasonably practicable, consider any representations received by that person in relation to varying or revoking an order under Sch 7 para 2: Sch 7 para 2(11).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/D. PUBLIC INTEREST AND SPECIAL PUBLIC INTEREST CASES/229. Enforcement provisions relating to undertakings in lieu of references to the Competition Commission.

## **229. Enforcement provisions relating to undertakings in lieu of references to the Competition Commission.**

If the Secretary of State<sup>1</sup> has power to make a reference to the Competition Commission<sup>2</sup> and otherwise intends to make such a reference<sup>3</sup>, then he may, instead of making such a reference and for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the relevant merger situation<sup>4</sup> concerned or (as the case may be) the special merger situation<sup>5</sup> concerned, accept from such of the parties concerned as he considers appropriate undertakings to take such action as he considers appropriate<sup>6</sup>.

The relevant authority<sup>7</sup> must not make a reference to the Commission<sup>8</sup> in relation to the creation of a relevant merger situation or (as the case may be) a reference<sup>9</sup> in relation to the creation of a special merger situation if the Secretary of State has accepted an undertaking<sup>10</sup> or group of undertakings as described above and the relevant merger situation or (as the case may be) the special merger situation is the situation by reference to which the undertaking or group of undertakings was accepted<sup>11</sup>. However, this does not prevent the making of a reference if material facts about relevant arrangements or transactions, or relevant proposed arrangements or transactions, were not notified<sup>12</sup> to the Secretary of State or the Office of Fair Trading (the 'OFT') or made public before any undertaking concerned was accepted<sup>13</sup>.

Where the Secretary of State considers that an undertaking accepted by him<sup>14</sup> has not been, is not being or will not be fulfilled, or where in relation to an undertaking accepted by him information which was false or misleading in a material respect was given to him or the OFT by the person giving the undertaking before he decided to accept the undertaking<sup>15</sup>, then the Secretary of State may make an order for the purpose of remedying, mitigating or preventing any of the effects adverse to the public interest which have or may have resulted, or which may be expected to result, from the creation of the relevant merger situation concerned or (as the case may be) the special merger situation concerned<sup>16</sup>. Where the Secretary of State has the power to make such an order<sup>17</sup> in relation to a particular undertaking and intends to make such an order, or where he has the power to make a final order<sup>18</sup> in relation to a particular undertaking and intends to make such an order<sup>19</sup>, then he may, for the purpose of preventing any action which might prejudice the making of that order, make another order<sup>20</sup>. This order may:

- (1) prohibit or restrict the doing of things which the Secretary of State considers would prejudice the making of the original order<sup>21</sup>;
- (2) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets<sup>22</sup>;
- (3) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner<sup>23</sup>;
- (4) require any person to supply information to the relevant authority, or where the OFT is not the relevant authority, require any person to supply information to the OFT, and provide for the publication, by the person who has received information, of that information<sup>24</sup>.

1 As to the Secretary of State see PARA 5.

2 Ie under the Enterprise Act 2002 s 45 (see PARA 193) or s 62 (see PARA 208). As to the Competition Commission see PARAS 9-12.

3 Enterprise Act 2002 Sch 7 para 3(1).

4 As to the meaning of 'relevant merger situation' see PARA 173.

5 As to the meaning of 'special merger situation' see PARA 204.

6 Enterprise Act 2002 Sch 7 para 3(2). In proceeding under Sch 7 para 3(2), the Secretary of State must, in particular: (1) accept the decisions of the OFT included in its report under s 44 so far as they relate to the matters mentioned in s 44(4), (5) (see PARA 191); or (2) (as the case may be) accept the decisions of the OFT included in its report under s 61 so far as they relate to the matters mentioned in s 61(3)(a), (4) (see PARA 206): Sch 7 para 3(3). As to the Office of Fair Trading (the 'OFT') see PARAS 6-8. In proceeding under Sch 7 para 3(2) in relation to an anti-competitive outcome, the Secretary of State may, in particular, have regard to the effect of any action on any relevant customer benefits in relation to the creation of the relevant merger situation concerned: Sch 7 para 3(4). As to the meaning of 'anti-competitive outcome' see PARA 184. As to the meaning of 'action' see PARA 184 note 9. As to the meaning of 'relevant customer benefit' see PARA 180.

No undertaking may be accepted by the Secretary of State under Sch 7 para 3 in connection with a possible reference under s 45 (see PARA 193) if a public interest consideration mentioned in the intervention notice concerned has not been finalised and the period of 24 weeks beginning with the giving of that notice has not expired: Sch 7 para 3(5). As to the meaning of 'public interest consideration' see PARA 189 note 10. As to the meaning of 'intervention notice' see PARA 189 note 11. The Secretary of State may delay making a decision as to whether to accept any such undertaking (and any related decision as to whether to make a reference under s 45) if he considers that there is a realistic prospect of the public interest consideration being finalised within the period of 24 weeks beginning with the giving of the intervention notice concerned: Sch 7 para 3(6). However, such a delay must not extend beyond (a) the time when the public interest consideration is finalised; or (b) if earlier, the expiry of that 24 week period: Sch 7 para 3(7).

An undertaking under Sch 7 para 3 comes into force when accepted and may be varied or superseded by another undertaking or may be released by the Secretary of State: Sch 7 para 3(8). The Secretary of State

must, as soon as reasonably practicable, consider any representations received by him in relation to varying or releasing an undertaking: Sch 7 para 3(10). An undertaking under Sch 7 para 3 which is in force in relation to a relevant merger situation or (as the case may be) a special merger situation ceases to be in force if an order comes into force under Sch 7 para 5 or para 6 (see the text and notes 14-24) in relation to that undertaking: Sch 7 para 3(9).

7 For these purposes, 'relevant authority' means (1) in relation to a possible reference under s 22 (see PARA 172) or s 33 (see PARA 182), the OFT; and (2) in relation to a possible reference under s 45 (see PARA 193) or s 62 (see PARA 208), the Secretary of State: Enterprise Act 2002 Sch 7 para 4(2).

8 le a reference under the Enterprise Act 2002 s 22, s 33 or s 45 (see PARAS 172, 182, 193).

9 le under the Enterprise Act 2002 s 62 (see PARA 208).

10 le under the Enterprise Act 2002 Sch 7 para 3.

11 Enterprise Act 2002 Sch 7 para 4(1).

12 le whether in writing or otherwise: see Sch 7 para 4(3).

13 Enterprise Act 2002 Sch 7 para 4(3). Arrangements or transactions, or proposed arrangements or transactions, are relevant if they are the ones in consequence of which the enterprises concerned ceased or may have ceased, or may cease, to be distinct enterprises: Sch 7 para 4(4). The reference to 'made public' means so publicised as to be generally known or readily ascertainable: Sch 7 para 4(5).

14 le an undertaking under the Enterprise Act 2002 Sch 7 para 3: see the text and notes 1-6.

15 Enterprise Act 2002 Sch 7 para 5(1).

16 Enterprise Act 2002 Sch 7 paras 3(2), 5(2). Schedule 7 para 3(3), (4) (see note 6) is also applicable for the purposes of Sch 7 para 5(2): Sch 7 para 5(3). An order under Sch 7 para 5(2) may contain anything permitted by Sch 8 (see PARAS 232-239), as well as such supplementary, consequential or incidental provision as the Secretary of State considers appropriate: Sch 7 para 5(4). The order or any explanatory material accompanying the order must state: (1) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing; (2) the date on which the order comes into force; (3) the possible consequences of not complying with the order; and (4) the statutory provision under which a review can be sought in relation to the order: s 88(1), (2). Such an order comes into force at such time as is determined by or under the order, and it may contain provision which is different from the provision contained in the undertaking concerned: Sch 7 para 5(5). No order may be varied or revoked under Sch 7 para 5 unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances: Sch 7 para 5(6).

17 le under the Enterprise Act 2002 Sch 7 para 5.

18 le under the Enterprise Act 2002 Sch 7 para 10 (see PARA 231).

19 Enterprise Act 2002 Sch 7 para 6(1).

20 Enterprise Act 2002 Sch 7 para 6(2). No order may be made under Sch 7 para 6(2) unless the Secretary of State has reasonable grounds for suspecting that it is or may be the case that action which might prejudice the making of the order under Sch 7 para 5 or (as the case may be) Sch 7 para 10 is in progress or in contemplation: Sch 7 para 6(3). An order under Sch 7 para 6 comes into force at such time as is determined by or under the order: Sch 7 para 6(5). Such an order, if it has not previously ceased to be in force, ceases to be in force on (1) the coming into force of an order under Sch 7 para 5 or (as the case may be) Sch 7 para 10 in relation to the undertaking concerned; or (2) the making of the decision not to proceed with such an order: Sch 7 para 6(6). The Secretary of State must, as soon as reasonably practicable, consider any representations received by him in relation to varying or revoking an order under Sch 7 para 6: Sch 7 para 6(7).

21 Enterprise Act 2002 Sch 7 para 6(4)(a). The reference in the text to the original order is a reference to the order under Sch 7 para 5 or Sch 7 para 10.

22 Enterprise Act 2002 Sch 7 para 6(4)(b).

23 Enterprise Act 2002 Sch 7 para 6(4)(c).

24 Enterprise Act 2002 Sch 7 para 6(4)(d), Sch 8 para 19.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/D. PUBLIC INTEREST AND SPECIAL PUBLIC INTEREST CASES/230. Statutory restrictions following certain references to the Competition Commission.

### **230. Statutory restrictions following certain references to the Competition Commission.**

Where the Secretary of State<sup>1</sup> has made a certain reference<sup>2</sup> to the Competition Commission<sup>3</sup> but it has not been finally determined<sup>4</sup>, and no pre-emptive undertakings<sup>5</sup> are in force in relation to the relevant merger situation concerned<sup>6</sup> or (as the case may be) the special merger situation<sup>7</sup> concerned and no pre-emptive orders<sup>8</sup> are in force in relation to that situation<sup>9</sup>, then no relevant person<sup>10</sup> may, without the consent of the Secretary of State<sup>11</sup>:

- (1) complete any outstanding matters in connection with any arrangements which have resulted in the enterprises concerned ceasing to be distinct enterprises<sup>12</sup>;
- (2) make any further arrangements in consequence of that result (other than arrangements which reverse that result)<sup>13</sup>; or
- (3) transfer the ownership or control of any enterprises to which the reference relates<sup>14</sup>.

Nor may any relevant person, without the consent of the Secretary of State, assist in any of the activities mentioned in heads (1) to (3)<sup>15</sup>. These prohibitions do not, however, apply in relation to anything which the person concerned is required to do by virtue of any enactment<sup>16</sup>. They apply to a person's conduct outside the United Kingdom if (and only if) he is a United Kingdom national, or a body incorporated under the law of the United Kingdom or of any part of the United Kingdom, or a person carrying on business in the United Kingdom<sup>17</sup>.

Where a certain reference has been made<sup>18</sup> and no pre-emptive undertakings<sup>19</sup> are in force in relation to the relevant merger situation concerned or (as the case may be) special merger situation concerned and no pre-emptive orders<sup>20</sup> are in force in relation to that situation<sup>21</sup>, then no relevant person<sup>22</sup> may, without the consent of the Secretary of State<sup>23</sup>, directly or indirectly acquire during the relevant period<sup>24</sup> an interest in shares in a company<sup>25</sup> if any enterprise to which the reference relates is carried on by or under the control of that company<sup>26</sup>. This prohibition applies to a person's conduct outside the United Kingdom if (and only if) he is a United Kingdom national, or a body incorporated under the law of the United Kingdom or of any part of the United Kingdom, or a person carrying on business in the United Kingdom<sup>27</sup>.

1 As to the Secretary of State see PARA 5.

2 Ie a reference has been made under the Enterprise Act 2002 s 45(2) or s 45(3) (see PARA 193) or 62(2) (see PARA 208).

3 As to the Competition Commission see PARAS 9-12.

4 The time when a reference under the Enterprise Act 2002 s 45(2) or s 45(3) is finally determined is as follows: (1) when the time within which the Commission is to prepare a report under s 50 in relation to the reference and give it to the Secretary of State has expired and no such report has been so prepared and given, then it is the expiry of the time concerned (Sch 7 para 7(8)(a), (10)(a)); (2) when the Commission decides to cancel the reference under s 53(1), then it is the making of the decision concerned (Sch 7 para 7(8)(b), 7(10)(b)); (3) when the time within which the Secretary of State is to make and publish a decision under s 54(2) has expired and no such decision has been made and published, then it is the expiry of the time concerned (Sch 7 para 7(8)(c), (10)(a)); (4) when the Secretary of State decides under s 54(2) to make no finding at all in the

matter, then it is the making of the decision concerned (Sch 7 para 7(8)(d), (10)(b)); (5) when the Secretary of State otherwise decides under s 54(2) not to make an adverse public interest finding, then it is the making of the decision concerned (Sch 7 para 7(8)(e), (10)(b)); (6) when the Secretary of State decides under s 54(2) to make an adverse public interest finding but decides neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11, then it is the making of the decision neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11 (Sch 7 para 7(8)(f), (10)(c)); or (7) when the Secretary of State decides under s 54(2) to make an adverse public interest finding and accepts an undertaking under Sch 7 para 9 or makes an order under Sch 7 para 11, then it is the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned (Sch 7 para 7(8)(g), (10)(d)).

The time when a reference under s 62(2) is finally determined is as follows: (a) when the time within which the Commission is to prepare a report under s 65 in relation to the reference and give it to the Secretary of State has expired and no such report has been so prepared and given, then it is the expiry of the time concerned (Sch 7 para 7(9)(a), (10)(a)); (b) when the time within which the Secretary of State is to make and publish a decision under s 66(2) has expired and no such decision has been made and published, then it is the expiry of the time concerned (Sch 7 para 7(9)(b), (10)(a)); (c) when the Secretary of State decides under s 66(2) otherwise than as mentioned in s 66(5), then it is the making of the decision concerned (Sch 7 para 7(9)(c), (10)(b)); (d) when the Secretary of State decides under s 66(2) as mentioned in s 66(5) but decides neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11, then it is the making of the decision neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11 (Sch 7 para 7(9)(d), (10)(c)); or (e) when the Secretary of State decides under s 66(2) as mentioned in s 66(5) and accepts an undertaking under Sch 7 para 9 or makes an order under Sch 7 para 11, then it is the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned (Sch 7 para 7(9)(e), (10)(d)). Section 79 (see PARA 222) applies to Sch 7 para 7 with modifications: see Sch 7 para 8(10), (11).

5       Ie under the Enterprise Act 2002 Sch 7 para 1 (see PARA 228).

6       As to the meaning of 'relevant merger situation' see PARA 173.

7       As to the meaning of 'special merger situation' see PARA 204.

8       Ie under the Enterprise Act 2002 Sch 7 para 2 (see PARA 228).

9       Enterprise Act 2002 Sch 7 para 7(1).

10       For these purposes, 'relevant person' means: (1) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise; (2) any subsidiary of any person falling within head (1); or (3) any person associated with any person falling within head (1) or any subsidiary of any person so associated: Enterprise Act 2002 Sch 7 para 7(11).

11       The consent of the Secretary of State under the Enterprise Act 2002 Sch 7 para 7(2) or Sch 7 para 7(3) may be general or specific and may be revoked by the Secretary of State: Sch 7 para 7(5)(a), (b). It must be published in such manner as the Secretary of State considers appropriate for bringing it to the attention of any person entitled to the benefit of it (Sch 7 para 7(5)(c)), but not if the Secretary of State considers that publication is not necessary for that purpose (Sch 7 para 7(6)).

12       Enterprise Act 2002 Sch 7 para 7(2)(a). As to enterprises ceasing to be distinct see PARA 176.

13       Enterprise Act 2002 Sch 7 para 7(2)(b).

14       Enterprise Act 2002 Sch 7 para 7(2)(c).

15       Enterprise Act 2002 Sch 7 para 7(3). As to the consent of the Secretary of State see note 23.

16       Enterprise Act 2002 Sch 7 para 7(4).

17       Enterprise Act 2002 Sch 7 para 7(7).

18       Ie a reference has been made under the Enterprise Act 2002 s 45(4) or s 45(5) (see PARA 193) or s 62(3) (see PARA 208).

19       Ie under the Enterprise Act 2002 Sch 7 para 1 (see PARA 228).

20       Ie under the Enterprise Act 2002 Sch 7 para 2 (see PARA 228).

21       Enterprise Act 2002 Sch 7 para 8(1).

22       For these purposes, 'relevant person' means: (1) any person who carries on any enterprise to which the reference relates or who has control of any such enterprise; (2) any subsidiary of any person falling within head

(1); or (3) any person associated with any person falling within head (1) or any subsidiary of any person so associated: Enterprise Act 2002 Sch 7 para 8(6).

23 The consent of the Secretary of State under the Enterprise Act 2002 Sch 7 para 8(2) may be general or specific and may be revoked by the Secretary of State: Sch 7 para 8(3)(a), (b). It must be published in such manner as the Secretary of State considers appropriate for bringing it to the attention of any person entitled to the benefit of it (Sch 7 para 8(3)(c)), but not if the Secretary of State considers that publication is not necessary for that purpose (Sch 7 para 8(4)).

24 'Relevant period' means the period beginning with the publication of the decision of the Secretary of State to make the reference concerned and ending when the reference is finally determined: Enterprise Act 2002 Sch 7 para 8(6). The time when a reference under s 45(4) or s 45(5) is finally determined is as follows: (1) when the Commission cancels the reference under s 48(1) or s 53(1), then it is the making of the decision concerned (Sch 7 para 8(7)(a), (9)(a)); (2) when the time within which the Commission is to prepare a report under s 50 in relation to the reference and give it to the Secretary of State has expired and no such report has been so prepared and given, then it is the expiry of the time concerned (Sch 7 para 8(7)(b), (9)(b)); (3) when the time within which the Secretary of State is to make and publish a decision under s 54(2) has expired and no such decision has been made and published, then it is the expiry of the time concerned (Sch 7 para 8(7)(c), (9)(b)); (4) when the Secretary of State decides under s 54(2) to make no finding at all in the matter, then it is the making of the decision concerned (Sch 7 para 8(7)(d), (9)(a)); (5) when the Secretary of State otherwise decides under s 54(2) not to make an adverse public interest finding, then it is the making of the decision concerned (Sch 7 para 8(7)(e), (9)(a)); (6) when the Secretary of State decides under s 54(2) to make an adverse public interest finding but decides neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11, then it is the making of the decision neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11 (Sch 7 para 8(7)(f), (9)(c)); or (7) when the Secretary of State decides under s 54(2) to make an adverse public interest finding and accepts an undertaking under Sch 7 para 9 or makes an order under Sch 7 para 11, then it is the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned (Sch 7 para 8(7)(g), (9)(d)).

The time when a reference under s 62(3) is finally determined is as follows: (a) when the Commission cancels the reference under s 64(1), then it is the making of the decision concerned (Sch 7 para 8(8)(a), (9)(a)); (b) when the time within which the Commission is to prepare a report under s 65 in relation to the reference and give it to the Secretary of State has expired and no such report has been so prepared and given, then it is the expiry of the time concerned (Sch 7 para 8(8)(b), (9)(b)); (c) when the time within which the Secretary of State is to make and publish a decision under s 66(2) has expired and no such decision has been made and published, then it is the expiry of the time concerned (Sch 7 para 8(8)(c), (9)(b)); (d) when the Secretary of State decides under s 66(2) otherwise than as mentioned in s 66(5), then it is the making of the decision concerned (Sch 7 para 8(8)(d), (9)(a)); (e) when the Secretary of State decides under s 66(2) as mentioned in s 66(5) but decides neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11, then it is the making of the decision neither to accept an undertaking under Sch 7 para 9 nor to make an order under Sch 7 para 11 (Sch 7 para 8(8)(e), (9)(c)); or (f) when the Secretary of State decides under s 66(2) as mentioned in s 66(5) and accepts an undertaking under Sch 7 para 9 or makes an order under Sch 7 para 11, then it is the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned (Sch 7 para 8(8)(f), (9)(d)). Section 79 (see PARA 221) applies to Sch 7 para 8 with modifications: see Sch 7 para 8(10), (11).

25 For these purposes, 'company' includes any body corporate; and 'share' means share in the capital of a company, and includes stock: Enterprise Act 2002 Sch 7 para 8(6).

26 Enterprise Act 2002 Sch 7 para 8(2).

27 Enterprise Act 2002 Sch 7 para 8(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/D. PUBLIC INTEREST AND SPECIAL PUBLIC INTEREST CASES/231. Enforcement provisions relating to final undertakings and orders.

### **231. Enforcement provisions relating to final undertakings and orders.**

Where the Secretary of State<sup>1</sup> has decided<sup>2</sup> to make an adverse public interest finding<sup>3</sup> in relation to a relevant merger situation<sup>4</sup> and has published his decision within the period so



required<sup>5</sup>, he may take such of the following action as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation concerned<sup>6</sup>. Similarly, where the Secretary of State has decided and published his decision that:

- (1) a special merger situation<sup>7</sup> has been created or arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation<sup>8</sup>;
- (2) at least one consideration which is mentioned in the special intervention notice<sup>9</sup> concerned is relevant to a consideration of the special merger situation concerned<sup>10</sup>; and
- (3) taking account only of the relevant consideration or considerations concerned, the creation of that situation operates or may be expected to operate against the public interest<sup>11</sup>,

he may take such of the following action as he considers to be reasonable and practicable to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the special merger situation concerned<sup>12</sup>.

The action which the Secretary of State may take is as follows. He may<sup>13</sup> accept, from such persons as he considers appropriate, undertakings to take action<sup>14</sup> specified or described in the undertakings<sup>15</sup>. Alternatively, he may make an order<sup>16</sup>.

Where the Secretary of State considers that (1) an undertaking so accepted by him has not been, is not being or will not be fulfilled<sup>17</sup>; or (2) in relation to an undertaking so accepted by him, information which was false or misleading in a material respect was given to him or the Office of Fair Trading (the 'OFT')<sup>18</sup> by the person giving the undertaking before he decided to accept the undertaking<sup>19</sup>, then the Secretary of State may, in order to remedy, mitigate or prevent any of the effects adverse to the public interest which have resulted from, or may be expected to result from, the creation of the relevant merger situation concerned<sup>20</sup>, make an order<sup>21</sup>.

- 1 As to the Secretary of State see PARA 5.
- 2 Ie under the Enterprise Act 2002 s 54(2) within the period required by s 54(5) (see PARA 200).
- 3 As to the meaning of 'adverse public interest finding' see PARA 200 note 4.
- 4 As to the meaning of 'relevant merger situation' see PARA 173.
- 5 Enterprise Act 2002 s 55(1).
- 6 Enterprise Act 2002 s 55(2).
- 7 As to the meaning of 'special merger situation' see PARA 204.
- 8 Enterprise Act 2002 s 66(5)(a).
- 9 As to the meaning of 'special intervention notice' see PARA 204.
- 10 Enterprise Act 2002 s 66(5)(b).
- 11 Enterprise Act 2002 s 66(5)(c).
- 12 Enterprise Act 2002 s 66(6).

13 le in accordance with the Enterprise Act 2002 s 55 (see PARA 201) or (as the case may be) s 66(5)-(7) (see PARA 212).

14 As to the meaning of 'action' see PARA 184 note 9.

15 Enterprise Act 2002 Sch 7 para 9(1). An undertaking under Sch 7 para 9 comes into force when accepted and it may be varied or superseded by another undertaking, and may be released by the Secretary of State: Sch 7 para 9(2). An undertaking which is in force under Sch 7 para 9 in relation to a reference under s 45 (see PARA 193) or s 62 (see PARA 208) ceases to be in force if an order under Sch 7 para 6(1)(b) (see PARA 229) or Sch 7 para 10 comes into force in relation to the subject-matter of the undertaking: Sch 7 para 9(3). No undertaking is to be accepted under Sch 7 para 9 in relation to a reference under s 45 or s 62 if an order has been made under (1) Sch 7 para 6(1)(b) or Sch 7 para 10 in relation to the subject-matter of the undertaking; or (2) Sch 7 para 11 in relation to that reference: Sch 7 para 9(4). The Secretary of State must, as soon as reasonably practicable, consider any representations received by him in relation to varying or releasing an undertaking under Sch 7 para 9: Sch 7 para 9(5).

16 Enterprise Act 2002 Sch 7 para 11(1). An order under Sch 7 para 11 may contain anything permitted by Sch 8, as well as such supplementary, consequential or incidental provision as the Secretary of State considers appropriate: Sch 7 para 11(2). The order or any explanatory material accompanying the order must state: (1) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing; (2) the date on which the order comes into force; (3) the possible consequences of not complying with the order; and (4) the statutory provision under which a review can be sought in relation to the order: s 88(1), (2). An order under Sch 7 para 11 comes into force at such time as is determined by or under the order: Sch 7 para 11(3). No order may be made under Sch 7 para 11 in relation to a reference under s 45 or (as the case may be) s 62 if an undertaking has been accepted under Sch 7 para 9 in relation to that reference: Sch 7 para 11(4). No order may be varied or revoked under Sch 7 para 11 unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances: Sch 7 para 11(5).

17 Enterprise Act 2002 Sch 7 para 10(1)(a).

18 As to the OFT see PARAS 6-8.

19 Enterprise Act 2002 Sch 7 para 10(1)(b).

20 See the Enterprise Act 2002 ss 55(2), 66(6) (see PARAS 201, 212).

21 Enterprise Act 2002 Sch 7 para 10(2). Section 55(3), (4) (see PARA 201) or (as the case may be) s 66(7) (see PARA 212) applies for these purposes: Sch 7 para 10(3). An order under Sch 7 para 10 may contain anything permitted by Sch 8 (see PARAS 232-239), as well as such supplementary, consequential or incidental provision as the Secretary of State considers appropriate: Sch 7 para 10(4). The order or any explanatory material accompanying the order must state: (1) the actions that the persons or description of persons to whom the order is addressed must do or (as the case may be) refrain from doing; (2) the date on which the order comes into force; (3) the possible consequences of not complying with the order; and (4) the statutory provision under which a review can be sought in relation to the order: s 88(1), (2). An order under Sch 7 para 10 comes into force at such time as is determined by or under the order, and it may contain provision which is different from the provision contained in the undertaking concerned: Sch 7 para 10(5). No order may be varied or revoked under Sch 7 para 10 unless the OFT advises that such a variation or revocation is appropriate by reason of a change of circumstances: Sch 7 para 10(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/232. Enforcement orders.

## ***E. UNDERTAKINGS AND ORDERS***

### **232. Enforcement orders.**

The Enterprise Act 2002 contains provisions relating to enforcement orders<sup>1</sup>, and specifies what provision may be made in such orders<sup>2</sup>.

An enforcement order may extend to a person's conduct outside the United Kingdom<sup>3</sup> if (and only if) he is a United Kingdom national, a body incorporated under the law of the United Kingdom or of any part of the United Kingdom, or a person carrying on business in the United Kingdom<sup>4</sup>. Nothing in an enforcement order has effect so as to (1) cancel or modify conditions in licences granted under a patent<sup>5</sup> or a European patent (UK) or in respect of a design registered under the Registered Designs Act 1949 by the proprietor of the patent or design<sup>6</sup>; or (2) require an entry to be made in the register of patents or the register of designs to the effect that licences under such a patent or such a design are to be available as of right<sup>7</sup>. An enforcement order may prohibit the performance of an agreement already in existence when the order is made<sup>8</sup>.

An order, as well as making provision in relation to all cases to which it may extend, may make provision in relation to those cases subject to specified exceptions, or any particular case or class of case<sup>9</sup>. An order may, in relation to the cases in relation to which it applies, make the full provision which may be made by it or any less provision (whether by way of exception or otherwise)<sup>10</sup>. An order may make provision for matters to be determined under the order<sup>11</sup>, and it may make different provision for different cases or classes of case or different purposes and make such transitional, transitory or saving provision as the person making it considers appropriate<sup>12</sup>.

An order which may prohibit the doing of anything (or the refraining from doing anything) may in particular<sup>13</sup> prohibit the doing of that thing (or the refraining from doing of it) except to such extent and in such circumstances as may be provided by or under the order<sup>14</sup>.

1 For these purposes, 'enforcement order' means an order made under the Enterprise Act 2002 s 72 (see PARA 216), s 75 (see PARA 219), s 76 (see PARA 220), s 81 (see PARA 224), s 83 (see PARA 225) or s 84 (see PARA 226) or under Sch 7 para 2 (see PARA 228), Sch 7 paras 5, 6 (see PARA 229), Sch 7 para 10 or 11 (see PARA 231): see s 86(6).

2 See the Enterprise Act 2002 s 86(4), Sch 8. As to the provisions which may be included in enforcement orders see PARAS 233-239. Schedule 8 applies in relation to such orders, and to such extent, as is provided by Pt 3 and Pt 4 and any other enactment (and references in Sch 8 to an order are to be construed accordingly): Sch 8 para 1. The Secretary of State may by order made by statutory instrument modify Sch 8: see s 206. As to the Secretary of State see PARA 5.

3 As to the meaning of 'United Kingdom' see PARA 401 note 1.

4 Enterprise Act 2002 s 86(1).

5 I.e a patent granted under the Patents Act 1977 (see **PATENTS AND REGISTERED DESIGNS**).

6 Enterprise Act 2002 s 86(2)(a).

7 Enterprise Act 2002 s 86(2)(b).

8 Enterprise Act 2002 s 86(3).

9 Enterprise Act 2002 Sch 8 para 21(1).

10 Enterprise Act 2002 Sch 8 para 21(2).

11 Enterprise Act 2002 Sch 8 para 21(3).

12 Enterprise Act 2002 Sch 8 para 21(4).

13 I.e by virtue of the Enterprise Act 2002 Sch 8 para 21(2): see the text and note 10.

14 Enterprise Act 2002 Sch 8 para 22(1). Any such order may, in particular, prohibit the doing of that thing (or the refraining from doing of it) without the agreement of the relevant authority or another person, or by or in relation to a person who has not been approved by the relevant authority or another person: Sch 8 para 22(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/233. General restrictions on conduct.

### **233. General restrictions on conduct.**

An order<sup>1</sup> may prohibit the making or performance of an agreement, or require any party to an agreement to terminate the agreement<sup>2</sup>. However, such an order may not prohibit the making or performance of an agreement, or require any person to terminate an agreement so far as, if made, the agreement would relate, or (as the case may be) so far as the agreement relates, to the terms and conditions of employment of any workers or to the physical conditions in which any workers are required to work<sup>3</sup>.

An order may prohibit the withholding from any person of any goods or services, or any orders for any such goods or services<sup>4</sup>. An order may prohibit requiring as a condition of the supply of goods or services to any person: (1) the buying of any goods; (2) the making of any payment in respect of services other than the goods or services supplied; (3) the doing of any other such matter or the refraining from doing anything mentioned in head (1) or (2) or any other such matter<sup>5</sup>.

An order may prohibit: (a) discrimination between persons in the prices charged for goods or services; (b) anything which the relevant authority considers to be such discrimination; (c) procuring others to do anything which is such discrimination or which the relevant authority considers to be such discrimination<sup>6</sup>. An order may prohibit: (i) giving, or agreeing to give in other ways, any preference in respect of the supply of goods or services or in respect of the giving of orders for goods or services; (ii) giving, or agreeing to give in other ways, anything which the relevant authority considers to be a preference in respect of the supply of goods or services or in respect of the giving of orders for goods or services; (iii) procuring others to do anything mentioned in head (i) or (ii)<sup>7</sup>.

An order may prohibit charging, for goods or services supplied, prices differing from those in any published list or notification, as well as doing anything which the relevant authority considers to be charging such prices<sup>8</sup>. An order may regulate the prices to be charged for any goods or services<sup>9</sup>, but not unless the relevant report in relation to the matter concerned identifies the prices charged for the goods or services as requiring remedial action<sup>10</sup>.

An order may prohibit the exercise of any right to vote exercisable by virtue of the holding of any shares, stock or securities<sup>11</sup>.

1 As to the orders to which the Enterprise Act 2002 Sch 8 applies see PARA 232 notes 1, 2.

2 Enterprise Act 2002 Sch 8 para 2(1).

3 Enterprise Act 2002 Sch 8 para 2(2).

4 Enterprise Act 2002 Sch 8 para 3(1). The references to withholding include references to: (1) agreeing or threatening to withhold; and (2) procuring others to withhold or to agree or threaten to withhold: Sch 8 para 3(2).

5 Enterprise Act 2002 Sch 8 para 4.

6 Enterprise Act 2002 Sch 8 para 5. For the purposes of Sch 8, the 'relevant authority' means: (1) in the case of an order to be made by the Office of Fair Trading (the 'OFT'), the OFT; (2) in the case of an order to be made by the Competition Commission, the Commission; and (3) in the case of an order to be made by the Secretary of State, the Secretary of State: Sch 8 para 24. As to the OFT see PARAS 6-8. As to the Competition Commission see PARAS 9-12. As to the Secretary of State see PARA 5.

7 Enterprise Act 2002 Sch 8 para 6.

8 Enterprise Act 2002 Sch 8 para 7.

9 Enterprise Act 2002 Sch 8 para 8(1).

10 Enterprise Act 2002 Sch 8 para 8(2). 'Relevant report' means the report of the Competition Commission which is required by the enactment concerned before an order can be made under Sch 8: Sch 8 para 8(3). As to the Competition Commission see PARAS 9-12.

11 Enterprise Act 2002 Sch 8 para 9.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/234. General obligations to be performed.

### **234. General obligations to be performed.**

An order<sup>1</sup> may require a person to supply goods or services or to do anything which the relevant authority considers appropriate to facilitate the provision of goods or services<sup>2</sup>. An order may require a person who is supplying, or is to supply, goods or services to supply such goods or services to a particular standard or in a particular manner or to do anything which the relevant authority considers appropriate to facilitate the provision of such goods or services to that standard or in that manner<sup>3</sup>. An order may also require any activities to be carried on separately from any other activities<sup>4</sup>.

1 As to the orders to which the Enterprise Act 2002 Sch 8 applies see PARA 232 notes 1, 2.

2 Enterprise Act 2002 Sch 8 para 10(1). As to the meaning of 'relevant authority' see PARA 233 note 6.

3 Enterprise Act 2002 Sch 8 para 10(2).

4 Enterprise Act 2002 Sch 8 para 11.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/235. Acquisitions and divisions.

### **235. Acquisitions and divisions.**

An order<sup>1</sup> may prohibit or restrict: (1) the acquisition by any person of the whole or part of the undertaking or assets of another person's business; (2) the doing of anything which will or may result in two or more bodies corporate becoming interconnected bodies corporate<sup>2</sup>. An order may require that if an acquisition of the kind mentioned in head (1) is made, or anything is done which results in two or more bodies corporate becoming interconnected bodies corporate, the persons concerned or any of them must observe any prohibitions or restrictions imposed by or under the order<sup>3</sup>.

An order may provide for the division of any business (whether by the sale of any part of the undertaking or assets or otherwise)<sup>4</sup>, and the division of any group of interconnected bodies

corporate<sup>5</sup>. Such an order may contain such provision as the relevant authority considers appropriate to effect or take account of the division, including, in particular, provision as to:

- (a) the transfer or creation of property, rights, liabilities or obligations<sup>6</sup>;
- (b) the number of persons to whom the property, rights, liabilities or obligations are to be transferred or in whom they are to be vested<sup>7</sup>;
- (c) the time within which the property, rights, liabilities or obligations are to be transferred or vested<sup>8</sup>;
- (d) the adjustment of contracts (whether by discharge or reduction of any liability or obligation or otherwise)<sup>9</sup>;
- (e) the creation, allotment, surrender or cancellation of any shares, stock or securities<sup>10</sup>;
- (f) the formation or winding up of any company or other body of persons corporate or unincorporate<sup>11</sup>;
- (g) the amendment of the memorandum and articles or other instruments regulating any such company or other body of persons<sup>12</sup>;
- (h) the extent to which, and the circumstances in which, provisions of the order affecting a company or other body of persons corporate or unincorporate in its share capital, constitution or other matters may be altered by the company or other body of persons concerned<sup>13</sup>;
- (i) the registration of the order under any enactment by a company or other body of persons corporate or unincorporate which is affected by it as mentioned in head (h)<sup>14</sup>;
- (j) the continuation, with any necessary change of parties, of any legal proceedings<sup>15</sup>;
- (k) the approval by the relevant authority or another person of anything required by virtue of the order to be done or of any person to whom anything is to be transferred, or in whom anything is to be vested, by virtue of the order<sup>16</sup>; or
- (l) the appointment of trustees or other persons to do anything on behalf of another person which is required of that person by virtue of the order or to monitor the doing by that person of any such thing<sup>17</sup>.

1 As to the orders to which the Enterprise Act 2002 Sch 8 applies see PARA 232 notes 1, 2.

2 Enterprise Act 2002 Sch 8 para 12(1). See note 3.

3 Enterprise Act 2002 Sch 8 para 12(2). Schedule 8 para 12 also applies to any result consisting in two or more enterprises ceasing to be distinct enterprises (other than any result consisting in two or more bodies corporate becoming interconnected bodies corporate): Sch 8 para 12(3).

4 For these purposes, all the activities carried on by way of business by any one person or by any two or more interconnected bodies corporate may be treated as a single business: Enterprise Act 2002 Sch 8 para 13(2). As to the references in Sch 8 para 13 to the division of a business as mentioned in the text see Sch 8 para 14.

5 Enterprise Act 2002 Sch 8 para 13(1).

6 Enterprise Act 2002 Sch 8 para 13(3)(a). As to the meaning of 'relevant authority' see PARA 233 note 6.

7 Enterprise Act 2002 Sch 8 para 13(3)(b).

8 Enterprise Act 2002 Sch 8 para 13(3)(c).

9 Enterprise Act 2002 Sch 8 para 13(3)(d).

10 Enterprise Act 2002 Sch 8 para 13(3)(e).

11 Enterprise Act 2002 Sch 8 para 13(3)(f).

- 12 Enterprise Act 2002 Sch 8 para 13(3)(g).
- 13 Enterprise Act 2002 Sch 8 para 13(3)(h).
- 14 Enterprise Act 2002 Sch 8 para 13(3)(i).
- 15 Enterprise Act 2002 Sch 8 para 13(3)(j).
- 16 Enterprise Act 2002 Sch 8 para 13(3)(k).
- 17 Enterprise Act 2002 Sch 8 para 13(3)(l).

## **UPDATE**

### **235 Acquisitions and divisions**

NOTE 12--Enterprise Act 2002 Sch 8 para 13(3)(g) amended: SI 2009/1941.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/236. Supply and publication of information.

### **236. Supply and publication of information.**

An order<sup>1</sup> may require a person supplying goods or services to publish a list of prices or otherwise notify prices<sup>2</sup>. Such an order may also require or prohibit the publication or other notification of further information<sup>3</sup>.

An order may prohibit any person from notifying (whether by publication or otherwise) to persons supplying goods or services prices recommended or suggested as appropriate to be charged by those persons for those goods or services<sup>4</sup>.

An order may require a person supplying goods or services to publish: (1) accounting information in relation to the supply of the goods or services; (2) information in relation to the quantities of goods or services supplied; (3) information in relation to the geographical areas in which they are supplied<sup>5</sup>.

An order may require any person to supply information to the relevant authority<sup>6</sup>. Where the Office of Fair Trading (the 'OFT') is not the relevant authority, an order may require any person to supply information to the OFT<sup>7</sup>. An order may provide for the publication of that information, by the person who has received it<sup>8</sup>.

1 As to the orders to which the Enterprise Act 2002 Sch 8 applies see PARA 232 notes 1, 2.

2 Enterprise Act 2002 Sch 8 para 15(1). An order made by virtue of Sch 8 para 15 may provide for the manner in which information is to be published or otherwise notified: Sch 8 para 18.

3 Enterprise Act 2002 Sch 8 para 15(2). References in Sch 8 to the notification of prices or other information are not limited to the notification in writing of prices or other information: Sch 8 para 23.

4 Enterprise Act 2002 Sch 8 para 16.

5 Enterprise Act 2002 Sch 8 para 17(1). 'Accounting information', in relation to a supply of goods or services, means information as to: (1) the costs of the supply, including fixed costs and overheads; (2) the manner in which fixed costs and overheads are calculated and apportioned for accounting purposes of the

supplier; and (3) the income attributable to the supply: Sch 8 para 17(2). An order made by virtue of Sch 8 para 17 may provide for the manner in which information is to be published or otherwise notified: Sch 8 para 18.

- 6 Enterprise Act 2002 Sch 8 para 19(a). As to the meaning of 'relevant authority' see PARA 233 note 6.
- 7 Enterprise Act 2002 Sch 8 para 19(b). As to the OFT see PARAS 6-8.
- 8 See the Enterprise Act 2002 Sch 8 para 19(c).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/237. National security.

### **237. National security.**

An order<sup>1</sup> may make such provision as the person making the order considers to be appropriate in the interests of national security<sup>2</sup>. Such provision may, in particular, include provision requiring a person to do, or not to do, particular things<sup>3</sup>.

- 1 As to the orders to which the Enterprise Act 2002 Sch 8 applies see PARA 232 notes 1, 2.
- 2 Enterprise Act 2002 Sch 8 para 20(1). As to the interests of national security see s 58(1); and PARA 203.
- 3 Enterprise Act 2002 Sch 8 para 20(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/238. Newspaper mergers.

### **238. Newspaper mergers.**

Where an order is to be made following the giving of:

- (1) an intervention notice which mentions a newspaper public interest consideration<sup>1</sup>;
- (2) an intervention notice which mentions any other media public interest consideration in relation to a relevant merger situation in which one of the enterprises ceasing to be distinct is a newspaper enterprise<sup>2</sup>;
- (3) a special intervention notice which mentions a certain specified consideration<sup>3</sup>; or
- (4) a special intervention notice which, in relation to a special merger situation in which one of the enterprises ceasing to be distinct is a newspaper enterprise, mentions a certain specified consideration<sup>4</sup>,

and the consideration concerned is still relevant<sup>5</sup>, then the order may make such provision as the person making the order considers to be appropriate in all circumstances of the case<sup>6</sup>. Such provision may, in particular, include provision requiring a person to do, or not to do, particular things<sup>7</sup>. It may, in particular, include provision: (a) altering the constitution of a body corporate (whether in connection with the appointment of directors, the establishment of an editorial



board or otherwise)<sup>8</sup>; (b) requiring the agreement of the relevant authority or another person before the taking of particular action (including the appointment or dismissal of an editor, journalists or directors or acting as a shadow director)<sup>9</sup>; (c) attaching conditions to the operation of a newspaper<sup>10</sup>; (d) prohibiting consultation or co-operation between subsidiaries<sup>11</sup>.

1 Enterprise Act 2002 Sch 8 para 20A(1)(a)(i) (Sch 8 para 20A added by the Communications Act 2003 s 387). Schedule 8 para 20A is without prejudice to the operation of the other paragraphs of Sch 8 in relation to the order concerned: Sch 8 para 20A(6) (as so added). As to the meaning of 'intervention notice' see PARA 189 note 11. For these purposes, 'newspaper public interest consideration' means a media public interest consideration other than one which is such a consideration by virtue of s 58(2C), or by virtue of having been, in the opinion of the Secretary of State, concerned with broadcasting and a consideration that ought to have been specified in s 58 (see PARA 203): Sch 8 para 20A(5) (as so added). As to the meaning of 'public interest consideration' see PARA 189 note 10. As to the meaning of 'newspaper' see PARA 191 note 9.

2 Enterprise Act 2002 Sch 8 para 20A(1)(a)(ii) (as added: see note 1). As to the meaning of 'media public interest consideration' see PARA 191 note 9. As to the meaning of 'relevant merger situation' see PARA 173. As to the meaning of 'newspaper enterprise' see PARA 203 note 11.

3 Enterprise Act 2002 Sch 8 para 20A(1)(a)(iii) (as added: see note 1). The text refers to a consideration specified in s 58(2A) or (2B) (see PARA 203). As to the meaning of 'special intervention notice' see PARA 204.

4 Enterprise Act 2002 Sch 8 para 20A(1)(a)(iv) (as added: see note 1). The text refers to a consideration specified in s 58(2C) (see PARA 203). As to the meaning of 'special merger situation' see PARA 204.

5 Enterprise Act 2002 Sch 8 para 20A(1)(b) (as added: see note 1).

6 Enterprise Act 2002 Sch 8 para 20A(2) (as added: see note 1).

7 Enterprise Act 2002 Sch 8 para 20A(3) (as added: see note 1).

8 Enterprise Act 2002 Sch 8 para 20A(4)(a) (as added: see note 1).

9 Enterprise Act 2002 Sch 8 para 20A(4)(b) (as added: see note 1). As to the meaning of 'relevant authority' see PARA 233 note 6.

10 Enterprise Act 2002 Sch 8 para 20A(4)(c) (as added: see note 1).

11 Enterprise Act 2002 Sch 8 para 20A(4)(d) (as added: see note 1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/239. Maintaining the stability of the UK financial system.

### **239. Maintaining the stability of the UK financial system.**

An enforcement order in a case relating to the stability of the UK financial system<sup>1</sup> may make such provision as the person making the order considers to be appropriate in the interest of maintaining the stability of the UK financial system<sup>2</sup>. Such provision may, in particular, include provision requiring a person to do, or not to do, particular things<sup>3</sup>.

1 The Enterprise Act 2002 Sch 8 para 20B applies for the purposes of a relevant order under Sch 7 para 5, 10 or 11 (see PARAS 229, 231) but not for any other purposes of Pt 3 or Pt 4 or any other enactment: Sch 8 para 20B(1) (Sch 8 para 20B added by SI 2008/2645). 'Relevant order' means an order: (1) which is to be made following the giving of an intervention notice or special intervention notice which mentions the consideration specified in the Enterprise Act 2002 s 58(2D) (including, in the case of a notice given before the consideration was so specified, an intervention notice which mentions the consideration as a consideration which ought to be specified in s 58 (see PARA 203)); and (2) to which the consideration is still relevant: Sch 8 para 20B(5) (as so

added). As to the meaning of 'intervention notice' see PARA 189 note 11. As to the meaning of 'special intervention notice' see PARA 204.

2 Enterprise Act 2002 Sch 8 para 20B(2) (as added: see note 1). Schedule 8 para 20B is without prejudice to the operation of the other paragraphs of Sch 8 in relation to the order: Sch 8 para 20B(4) (as so added).

3 Enterprise Act 2002 Sch 8 para 20B(3) (as added: see note 1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/240. Delegated power of directions.

## 240. Delegated power of directions.

An enforcement order may authorise the person making the order to give certain directions to a person specified in the directions, or to the holder for the time being of a specified office in any body of persons corporate or unincorporate<sup>1</sup>. The directions which may be made are directions to take specified action for the purpose of carrying out, or ensuring compliance with, the enforcement order concerned, or to do, or refrain from doing, anything specified or described in the order which the person might be required by that order to do or refrain from doing<sup>2</sup>. An enforcement order may authorise the person making the order to vary or revoke any directions so given<sup>3</sup>.

The court<sup>4</sup> may by order require any person who has failed to comply with any such directions to comply with them, or otherwise remedy his failure, within such time as may be specified in the order<sup>5</sup>. Where the directions related to anything done in the management or administration of a body of persons corporate or unincorporate, the court may by order require the body of persons concerned or any officer of it to comply with the directions, or otherwise remedy the failure to comply with them, within such time as may be specified in the order<sup>6</sup>. Such court orders<sup>7</sup> are made on the application of the person authorised<sup>8</sup> to give the directions concerned<sup>9</sup>, and they may provide for all the costs or expenses of, or incidental to, the application for the order to be met by any person in default or by any officers of a body of persons corporate or unincorporate who are responsible for its default<sup>10</sup>.

1 Enterprise Act 2002 s 87(1). As to the meaning of 'enforcement order' see PARA 232 note 1.

2 Enterprise Act 2002 s 87(2).

3 Enterprise Act 2002 s 87(3).

4 For these purposes 'court' means, in relation to England and Wales or Northern Ireland, the High Court: Enterprise Act 2002 s 87(8).

5 Enterprise Act 2002 s 87(4).

6 Enterprise Act 2002 s 87(5).

7 I.e an order under the Enterprise Act 2002 s 87(4) or s 87(5).

8 I.e authorised by virtue of the Enterprise Act 2002 s 87.

9 Enterprise Act 2002 s 87(6).

10 Enterprise Act 2002 s 87(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/241. Procedural requirements for certain undertakings and orders.

## **241. Procedural requirements for certain undertakings and orders.**

The Enterprise Act 2002 sets out the procedure for accepting certain enforcement undertakings and for the making and termination of certain enforcement orders<sup>1</sup>. Before accepting such an undertaking<sup>2</sup> or making such an order<sup>3</sup>, the relevant authority (whether it be the Office of Fair Trading (the 'OFT')<sup>4</sup>, the Competition Commission<sup>5</sup> or the Secretary of State<sup>6</sup>) must give notice of the proposed undertaking or order<sup>7</sup>, and must consider any representations made in accordance with the notice and not withdrawn<sup>8</sup>. The relevant authority may not accept the undertaking with modifications or (as the case may be) make the order with modifications unless the relevant authority gives notice of the proposed modifications, and considers any representations made in accordance with the notice and not withdrawn<sup>9</sup>. If, after giving notice<sup>10</sup>, the relevant authority decides not to accept the undertaking concerned or (as the case may be) make the order concerned, and also not to proceed<sup>11</sup>, then the relevant authority must give notice of that decision<sup>12</sup>. As soon as practicable after accepting an undertaking<sup>13</sup> or (as the case may be) making an order<sup>14</sup>, the relevant authority must (except in the case of an order which is a statutory instrument) serve a copy of the undertaking on any person by whom it is given or (as the case may be) serve a copy of the order on any person identified in the order as a person on whom a copy of the order should be served, and must also publish the undertaking or (as the case may be) the order<sup>15</sup>.

Where the relevant authority is proposing to release a certain undertaking<sup>16</sup> or revoke a certain order<sup>17</sup>, it must, before doing so, give notice of the proposed release or (as the case may be) revocation, and also consider any representations made in accordance with the notice and not withdrawn<sup>18</sup>. As soon as practicable after releasing the undertaking or making the revoking order, the relevant authority must (except in the case of an order which is a statutory instrument) serve a copy of the release of the undertaking on the person who gave the undertaking or (as the case may be) serve a copy of the revoking order on any person identified in the order being revoked as a person on whom a copy of that order should be served, and must also publish the release or (as the case may be) the revoking order<sup>19</sup>.

The relevant authority may dispense with any or all of these requirements<sup>20</sup> if the relevant authority considers that the relevant authority has special reasons for doing so<sup>21</sup>.

1 Enterprise Act 2002 s 90. The procedure is set out in Sch 10 (see the text and notes 2-21). As to the meaning of 'enforcement undertaking' see PARA 215 note 4. As to the meaning of 'enforcement order' see PARA 232 note 1.

2 Ie any undertaking under the Enterprise Act 2002 s 73 (see PARA 217) or s 82 (see PARA 225) or Sch 7 para 3 (see PARA 229) or Sch 7 para 9 (see PARA 231) (other than an undertaking under the enactment concerned which varies an undertaking under that enactment but not in any material respect): Sch 10 para 1(a).

3 Ie any order under the Enterprise Act 2002 s 75 (see PARA 219), s 83 (see PARA 225) or s 84 (see PARA 226) or Sch 7 para 5 (see PARA 229), Sch 7 para 10 or 11 (see PARA 231) (other than an order under the enactment concerned which is a revoking order of the kind dealt with by Sch 10 paras 6-8): Sch 7 para 1(b).

4 As to the OFT see PARAS 6-8.

5 As to the Competition Commission see PARAS 9-12.

6 As to the Secretary of State see PARA 5.

7 Enterprise Act 2002 Sch 10 para 2(1)(a). The notice must state: (1) that the relevant authority proposes to accept the undertaking or (as the case may be) make the order; (2) the purpose and effect of the undertaking or (as the case may be) order; (3) the situation that the undertaking or (as the case may be) order is seeking to deal with; (4) any other facts which the relevant authority considers justify the acceptance of the undertaking or (as the case may be) the making of the order; (5) a means of gaining access to an accurate version of the proposed undertaking or (as the case may be) order at all reasonable times; and (6) the period (not less than 15 days starting with the date of publication of the notice in the case of an undertaking and not less than 30 days starting with that date in the case of an order) within which representations may be made in relation to the proposed undertaking or (as the case may be) order: Sch 10 para 2(2). The notice must be given, in the case of a proposed order, by serving on any person identified in the order as a person on whom a copy of the order should be served a copy of the notice and a copy of the proposed order; and, in every case, by publishing the notice: Sch 10 para 2(3).

8 Enterprise Act 2002 Sch 10 para 2(1)(b).

9 Enterprise Act 2002 Sch 10 para 2(4). The notice must state: (1) the proposed modifications; (2) the reasons for them; and (3) the period (not less than seven days starting with the date of the publication of the notice under Sch 10 para 2(4)) within which representations may be made in relation to the proposed modifications: Sch 10 para 2(5). The notice must be given, in the case of a proposed order, by serving a copy of the notice on any person identified in the order as a person on whom a copy of the order should be served; and, in every case, by publishing the notice: Sch 10 para 2(6).

The requirements of Sch 10 para 2(4) (and those of Sch 10 para 2(1)) do not apply if the relevant authority has already given notice under Sch 10 para 2(1) but not Sch 10 para 2(4) in relation to the proposed undertaking or order, and considers that the modifications which are now being proposed are not material in any respect: Sch 10 para 5(1). The requirements of Sch 10 para 2(4) (and those of Sch 10 para 2(1)) do not apply if the relevant authority has already given notice under Sch 10 para 2(1) and Sch 10 para 2(4) in relation to the matter concerned, and considers that the further modifications which are now being proposed do not differ in any material respect from the modifications in relation to which notice was last given under Sch 10 para 2(4): Sch 10 para 5(2).

10 Ie under the Enterprise Act 2002 Sch 10 para 2(1) or Sch 10 para 2(4).

11 Ie by virtue of the Enterprise Act 2002 Sch 10 para 5.

12 Enterprise Act 2002 Sch 10 para 3(1). The notice must be given, in the case of a proposed order, by serving a copy of the notice on any person identified in the order as a person on whom a copy of the order should be served; and, in every case, by publishing the notice: Sch 10 para 3(2).

13 See note 2.

14 See note 3.

15 Enterprise Act 2002 Sch 10 para 4.

16 Ie any undertaking under the Enterprise Act 2002 s 73 (see PARA 217) or s 82 (see PARA 225) or Sch 7 para 3 (see PARA 229) or Sch 7 para 9 (see PARA 231) (other than in connection with accepting an undertaking under the enactment concerned which varies or supersedes an undertaking under that enactment): Sch 10 para 6(a).

17 Ie any order under the Enterprise Act 2002 s 75 (see PARA 219), s 83 (see PARA 225) or s 84 (see PARA 226) or Sch 7 para 5 (see PARA 229), Sch 7 para 10 or 11 (see PARA 231) (other than in connection with making an order under the enactment concerned which varies or supersedes an order under that enactment): Sch 10 para 6(b).

18 Enterprise Act 2002 Sch 10 para 7(1). The notice must state: (1) the fact that a release or (as the case may be) revocation is proposed; (2) the reasons for it; and (3) the period (not less than 15 days starting with the date of publication of the notice in the case of an undertaking and not less than 30 days starting with that date in the case of an order) within which representations may be made in relation to the proposed release or (as the case may be) revocation: Sch 10 para 7(2). If after giving the notice the relevant authority decides not to proceed with the release or (as the case may be) the revocation, the relevant authority must give notice of that decision: Sch 10 para 7(3). A notice under Sch 10 para 7(1) or Sch 10 para 7(3) must be given by: (a) serving a copy of the notice on the person who gave the undertaking which is being released or (as the case may be) on any person identified in the order being revoked as a person on whom a copy of the order should be served; and (b) publishing the notice: Sch 10 para 7(4).

19 Enterprise Act 2002 Sch 10 para 8.

20 Ie the requirements of the Enterprise Act 2002 Sch 10 (see the text and notes 1-19).

21 Enterprise Act 2002 Sch 10 para 9.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/E. UNDERTAKINGS AND ORDERS/242. Register of undertakings and orders.

## **242. Register of undertakings and orders.**

The Office of Fair Trading (the 'OFT') is under a duty to compile and maintain a register of undertakings and orders<sup>1</sup> in such form as it considers appropriate<sup>2</sup>. It must ensure that the following matters are entered in the register: (1) the provisions of any enforcement undertaking accepted under Part 3 of the Enterprise Act 2002<sup>3</sup>; (2) the provisions of any enforcement order made under that Part<sup>4</sup>; (3) the details of any variation, release or revocation of such an undertaking or order<sup>5</sup>; and (4) the details of consents given by the Competition Commission<sup>6</sup> or by the Secretary of State<sup>7</sup>. However, the duty to include such matters does not extend to anything of which the OFT is unaware<sup>8</sup>. The Commission and the Secretary of State must inform the OFT of any matters which are to be included in the register and which relate to enforcement undertakings accepted by them, enforcement orders made by them or consents given by them<sup>9</sup>.

The OFT must ensure that the contents of the register are available to the public<sup>10</sup>, and if requested by any person to do so (and subject to such reasonable fees (if any) as the OFT may determine), the OFT must supply the person concerned with a certified copy of the register or of an extract from it<sup>11</sup>.

1 Enterprise Act 2002 s 91(1). As to the OFT see PARAS 6-8.

2 Enterprise Act 2002 s 91(2).

3 Enterprise Act 2002 s 91(3)(a). As to the meaning of 'enforcement undertaking' see PARA 215 note 4.

4 Enterprise Act 2002 s 91(3)(b). As to the meaning of 'enforcement order' see PARA 232 note 1.

5 Enterprise Act 2002 s 91(3)(c).

6 Ie under the Enterprise Act 2002 s 77(2), (3) or s 78(2): see s 91(3)(d). As to the Competition Commission see PARAS 9-12.

7 Ie under the Enterprise Act 2002 Sch 7 para 7(2), (3) or Sch 7 para 8(2): see s 91(3)(d). As to the Secretary of State see PARA 5.

8 Enterprise Act 2002 s 91(4).

9 Enterprise Act 2002 s 91(5).

10 The contents must be available to the public during (as a minimum) such hours as may be specified in an order made by the Secretary of State, and subject to such reasonable fees (if any) as the OFT may determine: Enterprise Act 2002 s 91(6).

11 Enterprise Act 2002 s 91(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/F. ENFORCEMENT FUNCTIONS OF THE OFFICE OF FAIR TRADING/243. Duty to monitor undertakings and orders.

## ***F. ENFORCEMENT FUNCTIONS OF THE OFFICE OF FAIR TRADING***

### **243. Duty to monitor undertakings and orders.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> must keep under review (1) the carrying out of any enforcement undertaking or any enforcement order<sup>2</sup>; and (2) compliance with statutory prohibitions<sup>3</sup>. The OFT must, in particular, from time to time consider whether an enforcement undertaking or enforcement order has been or is being complied with<sup>4</sup>. It must also consider whether, by reason of any change of circumstances, an enforcement undertaking is no longer appropriate and whether one or more of the parties to it can be released from it or whether it needs to be varied or to be superseded by a new enforcement undertaking<sup>5</sup>. It also has a duty to consider whether, by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked<sup>6</sup>.

The OFT must give the Competition Commission<sup>7</sup> or (as the case may be) the Secretary of State<sup>8</sup> such advice as it considers appropriate in relation to:

- (a) any possible variation or release by the Commission or (as the case may be) the Secretary of State of an enforcement undertaking accepted by it or (as the case may be) him<sup>9</sup>;
- (b) any possible new enforcement undertaking to be accepted by the Commission or (as the case may be) the Secretary of State so as to supersede another enforcement undertaking given to the Commission or (as the case may be) the Secretary of State<sup>10</sup>;
- (c) any possible variation or revocation by the Commission or (as the case may be) the Secretary of State of an enforcement order made by the Commission or (as the case may be) the Secretary of State<sup>11</sup>;
- (d) any possible enforcement undertaking to be accepted by the Commission or (as the case may be) the Secretary of State instead of an enforcement order or any possible enforcement order to be made by the Commission or (as the case may be) the Secretary of State instead of an enforcement undertaking<sup>12</sup>;
- (e) the enforcement<sup>13</sup> of any enforcement undertaking or enforcement order<sup>14</sup>;  
or
- (f) the enforcement<sup>15</sup> of statutory prohibitions<sup>16</sup>.

The OFT must take such action as it considers appropriate in relation to: (i) any possible variation or release by it of an enforcement undertaking accepted by it<sup>17</sup>; (ii) any possible new enforcement undertaking to be accepted by it so as to supersede another enforcement undertaking given to it<sup>18</sup>; (iii) any possible variation or revocation by it of an enforcement order made by it<sup>19</sup>; (iv) any possible enforcement undertaking to be accepted by it instead of an enforcement order or any possible enforcement order to be made by it instead of an enforcement undertaking<sup>20</sup>; (v) the enforcement by it<sup>21</sup> of any enforcement undertaking or enforcement order<sup>22</sup>; or (vi) the enforcement by it<sup>23</sup> of statutory prohibitions<sup>24</sup>.

The OFT must keep under review the effectiveness of enforcement undertakings accepted under Part 3 of the Enterprise Act 2002<sup>25</sup> and enforcement orders made under that Part<sup>26</sup>, and must, whenever requested to do so by the Secretary of State and otherwise from time to time, prepare a report of its findings in this respect<sup>27</sup>.

1 As to the OFT see PARAS 6-8.

2 Enterprise Act 2002 s 92(1)(a). As to the meaning of 'enforcement undertaking' see PARA 215 note 4. As to the meaning of 'enforcement order' see PARA 232 note 1.

3 Enterprise Act 2002 s 92(1)(b). This refers to the prohibitions in s 77(2), (3) (see PARA 221), s 78(2) (see PARA 222), Sch 7 paras 7(2), (3), 8(2) (see PARA 230).

4 Enterprise Act 2002 s 92(2)(a).

5 Enterprise Act 2002 s 92(2)(b).

6 Enterprise Act 2002 s 92(2)(c).

7 As to the Competition Commission see PARAS 9-12.

8 As to the Secretary of State see PARA 5.

9 Enterprise Act 2002 s 92(3)(a).

10 Enterprise Act 2002 s 92(3)(b).

11 Enterprise Act 2002 s 92(3)(c).

12 Enterprise Act 2002 s 92(3)(d).

13 le by virtue of the Enterprise Act 2002 s 94(6)-(8) (see PARA 245).

14 Enterprise Act 2002 s 92(3)(e).

15 le by virtue of the Enterprise Act 2002 s 95(4), (5) (see PARA 245).

16 Enterprise Act 2002 s 92(3)(f). As to the prohibitions see note 3.

17 Enterprise Act 2002 s 92(4)(a).

18 Enterprise Act 2002 s 92(4)(b).

19 Enterprise Act 2002 s 92(4)(c).

20 Enterprise Act 2002 s 92(4)(d).

21 le by virtue of the Enterprise Act 2002 s 94(6) (see PARA 245).

22 Enterprise Act 2002 s 92(4)(e).

23 le by virtue of the Enterprise Act 2002 s 95(4), (5) (see PARA 245).

24 Enterprise Act 2002 s 92(4)(f). As to the prohibitions see note 3.

25 le the Enterprise Act 2002 Pt 3 (ss 22-130).

26 Enterprise Act 2002 s 92(5).

27 Enterprise Act 2002 s 92(6). The OFT must give any report prepared by it under s 92(6) to the Commission, with a copy to the Secretary of State, and must also publish it: s 92(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/F. ENFORCEMENT FUNCTIONS OF THE OFFICE OF FAIR TRADING/244. Further role in relation to undertakings and orders.

#### **244. Further role in relation to undertakings and orders.**

Where the relevant authority (whether it be the Competition Commission<sup>1</sup> or the Secretary of State<sup>2</sup>) is considering whether to accept certain undertakings<sup>3</sup>, it may require the Office of Fair Trading (the 'OFT')<sup>4</sup> to consult with such persons as the relevant authority considers appropriate with a view to discovering whether they will offer undertakings which the relevant authority would be prepared to accept<sup>5</sup>. The relevant authority may require the OFT to report to the relevant authority on the outcome of the OFT's consultations within such period as the relevant authority may require<sup>6</sup>.

These powers conferred on the relevant authority<sup>7</sup> are without prejudice to the power of the relevant authority to consult the persons concerned itself<sup>8</sup>. If asked by the relevant authority for advice in relation to the taking of enforcement action (whether or not by way of undertaking) in a particular case, the OFT must give such advice as it considers appropriate<sup>9</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 As to the Secretary of State see PARA 5.

3 I.e (1) where the Commission is considering whether to accept undertakings under the Enterprise Act 2002 s 80 (see PARA 223) or s 82 (see PARA 225); or (2) the Secretary of State is considering whether to accept undertakings under Sch 7 para 1, 3 or 9 (see PARAS 228, 229, 231 respectively): s 93(1).

4 As to the OFT see PARAS 6-8.

5 I.e under the Enterprise Act 2002 s 80 or s 82 or (as the case may be) Sch 7 para 1, 3 or 9: s 93(2); and see note 3.

6 Enterprise Act 2002 s 93(3). This report must, in particular, contain advice from the OFT as to whether any undertakings offered should be accepted by the relevant authority under s 80 or s 82 or (as the case may be) Sch 7 para 1, 3 or 9 (see note 3): s 93(4).

7 I.e the powers conferred by the Enterprise Act 2002 s 93(1)-(4) (see the text and notes 1-6).

8 Enterprise Act 2002 s 93(5).

9 Enterprise Act 2002 s 93(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/G. RIGHTS TO ENFORCE/245. Enforcement undertakings and orders.

## ***G. RIGHTS TO ENFORCE***

### **245. Enforcement undertakings and orders.**

Any person to whom an enforcement undertaking<sup>1</sup> or enforcement order<sup>2</sup> relates has a duty to comply with it<sup>3</sup>. This duty is owed to any person who may be affected by a contravention of the undertaking or (as the case may be) order<sup>4</sup>. Any breach of the duty which causes such a person to sustain loss or damage is actionable by him<sup>5</sup>. However, in any such proceedings brought against a person to whom an enforcement undertaking or an enforcement order relates it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the undertaking or (as the case may be) order<sup>6</sup>.

Compliance with an enforcement undertaking or an enforcement order is also enforceable by civil proceedings brought by the Office of Fair Trading (the 'OFT')<sup>7</sup> for an injunction or for interdict or for any other appropriate relief or remedy<sup>8</sup>. Compliance with certain undertakings



and orders<sup>9</sup> is also enforceable by civil proceedings brought by the Competition Commission<sup>10</sup> or the Secretary of State<sup>11</sup> for an injunction or for interdict or for any other appropriate relief or remedy<sup>12</sup>.

1 As to the meaning of 'enforcement undertaking' see PARA 215 note 4.

2 As to the meaning of 'enforcement order' see PARA 232 note 1.

3 Enterprise Act 2002 s 94(1), (2).

4 Enterprise Act 2002 s 94(3).

5 Enterprise Act 2002 s 94(4).

6 Enterprise Act 2002 s 94(5).

7 As to the OFT see PARAS 6-8.

8 Enterprise Act 2002 s 94(6). Section 94(6) does not prejudice any right that a person may have by virtue of s 94(4) to bring civil proceedings for contravention or apprehended contravention of an enforcement undertaking or an enforcement order: s 94(9).

9 In compliance with an undertaking under the Enterprise Act 2002 s 80 (see PARA 223) or s 82 (see PARA 225), an order made by the Competition Commission under s 76 (see PARA 220) or an order under s 81 (see PARA 224), s 83 (see PARA 225) or s 84 (see PARA 226) is enforceable by civil proceedings brought by the Commission: s 94(7). Compliance with an undertaking under Sch 7 para 1, 3 or 9, an order made by the Secretary of State under Sch 7 para 2 or an order under Sch 7 para 5, 6, 10 or 11, is enforceable by civil proceedings brought by the Secretary of State: s 94(8).

10 As to the Competition Commission see PARAS 9-12.

11 As to the Secretary of State see PARA 5.

12 Enterprise Act 2002 s 94(7), (8). Section 94(7), (8) does not prejudice any right that a person may have by virtue of s 94(4) to bring civil proceedings for contravention or apprehended contravention of an enforcement undertaking or an enforcement order: s 94(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(iv) Enforcement/G. RIGHTS TO ENFORCE/246. Statutory restrictions.

## **246. Statutory restrictions.**

No relevant person may, without the consent of the Competition Commission<sup>1</sup>, or as the case may be, Secretary of State<sup>2</sup>:

- (1) complete any outstanding matters in connection with any arrangements which have resulted in the enterprises concerned ceasing to be distinct enterprises<sup>3</sup>;
- (2) make any further arrangements in consequence of that result (other than arrangements which reverse that result)<sup>4</sup>; or
- (3) transfer the ownership or control of any enterprises to which the reference relates<sup>5</sup>.

Nor may any relevant person, without the consent of the Commission or Secretary of State (as the case may be), assist in any of the activities listed above<sup>6</sup>. No relevant person may, without

the consent of the Commission or Secretary of State (as the case may be) directly or indirectly acquire during the relevant period an interest in shares in a company if any enterprise to which the reference relates is carried on by or under the control of that company<sup>7</sup>.

The obligation to comply with these provisions is a duty owed to any person who may be affected by a contravention of the enactment concerned<sup>8</sup>. Any breach of the duty which causes such a person to sustain loss or damage is actionable by him<sup>9</sup>. In any such proceedings it is a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the enactment concerned<sup>10</sup>.

Compliance with the provisions is also enforceable by civil proceedings brought by the Office of Fair Trading (the 'OFT')<sup>11</sup>, the Commission or the Secretary of State as the case may be for an injunction or for interdict or for any other appropriate relief or remedy<sup>12</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 As to the Secretary of State see PARA 5.

3 See the Enterprise Act 2002 s 77(2)(a) (see PARA 221), Sch 7 para 7(2)(a) (see PARA 230). As to the meaning of 'enterprise' see PARA 173 note 2.

4 See the Enterprise Act 2002 s 77(2)(b) (see PARA 221), Sch 7 para 7(2)(a) (see PARA 230).

5 See the Enterprise Act 2002 s 77(2)(c) (see PARA 221), Sch 7 para 7(2)(a) (see PARA 230).

6 See the Enterprise Act 2002 s 77(3) (see PARA 221), Sch 7 para 7(3) (see PARA 230).

7 See the Enterprise Act 2002 s 78(2) (see PARA 222), Sch 7 para 8(2) (see PARA 230).

8 Enterprise Act 2002 s 95(1).

9 Enterprise Act 2002 s 95(2).

10 Enterprise Act 2002 s 95(3).

11 As to the OFT see PARAS 6-8.

12 I.e. compliance with the Enterprise Act 2002 s 77(2), (3) or s 78(2) is enforceable by civil proceedings brought by the OFT or the Commission for an injunction or for an interdict or for any other appropriate relief or remedy: s 95(4). Compliance with Sch 7 para 7(2), (3) or Sch 7 para 8(2) is enforceable by civil proceedings brought by the OFT or the Secretary of State for an injunction or for interdict or for any other appropriate relief or remedy: s 95(5). Section 95(4), (5) does not prejudice any right that a person may have by virtue of s 95(2) to bring civil proceedings for contravention or apprehended contravention of s 77(2), (3) or s 78(2) or Sch 7 para 7(2), (3) or Sch 7 para 8(2): s 95(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(v) Merger Notices/247. Merger notices.

## **(v) Merger Notices**

### **247. Merger notices.**

Any person authorised by regulations<sup>1</sup> may give notice to the Office of Fair Trading (the 'OFT')<sup>2</sup> of proposed arrangements which might result in the creation of a relevant merger situation<sup>3</sup>. Such a notice is referred to as a 'merger notice' and it must be in the prescribed form and state that the existence of the proposal has been made public<sup>4</sup>.

Certain references to the Competition Commission are not permitted if the period for considering the merger notice has expired without a reference being made in relation to those arrangements<sup>5</sup>.

A merger notice may be withdrawn by or on behalf of the person who gave the notice by a notice in writing sent to the OFT<sup>6</sup>.

1       le any person carrying on an enterprise to which the notified arrangements relate: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 3. As to the meaning of 'enterprise' see PARA 173 note 2. 'Notified arrangements' means arrangements of which notice is given under the Enterprise Act 2002 s 96(1) or arrangements not differing from them in any material respect: s 96(6).

2       As to the OFT see PARAS 6-8.

3       Enterprise Act 2002 s 96(1). As to the meaning of 'relevant merger situation' see PARA 173. A merger notice given under s 96(1) is treated as having been received by the OFT on the day on which it is in fact received by the OFT: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 5. However, where it is received by the OFT on any day which is not a working day or after 5.00 pm on any working day, it is treated as having been received on the next working day, and the Interpretation Act 1978 s 7 does not apply: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 5.

4       Enterprise Act 2002 s 96(2).

5       See PARA 250. As to the period for considering merger notices see PARA 248.

6       Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 7. An authorisation to act on behalf of another person must be given to the OFT in writing and an authorisation to act on behalf of a company must be signed by a director or other officer of that company: see reg 14(1), (2). A person who has given an authorisation may revoke it by a notice in writing given to the OFT and, where that person is a company, the notice must be signed by a director or other officer of that company: reg 14(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(v) Merger Notices/248. Period for considering merger notices.

## **248. Period for considering merger notices.**

The period for considering a merger notice<sup>1</sup> is generally the period of 20 days beginning with the first day after the notice has been received by the Office of Fair Trading (the 'OFT')<sup>2</sup> and any fee<sup>3</sup> to the OFT in respect of the notice has been paid<sup>4</sup>. However, extensions are possible in the following circumstances.

Where no intervention notice<sup>5</sup> is in force in relation to the matter concerned, the OFT may by notice to the person who gave the merger notice extend by a further ten days the period for considering the merger notice<sup>6</sup>. Where an intervention notice is in force in relation to the matter concerned and there has been no such extension, the OFT may by notice to the person who gave the merger notice extend by a further 20 days the period for considering the merger notice<sup>7</sup>. Where an intervention notice is in force in relation to the matter concerned and there has been an extension<sup>8</sup>, the OFT may by notice to the person who gave the merger notice extend the period for considering the merger notice by a further number of days which, including any extension already made<sup>9</sup>, does not exceed 20 days<sup>10</sup>.

The OFT may by notice to the person who gave the merger notice extend the period for considering a merger notice if the OFT considers that the person has failed to provide<sup>11</sup> information requested of him in that notice<sup>12</sup>. This extension is for the period until the person

concerned provides the information to the satisfaction of the OFT or, if earlier, the cancellation by the OFT of the extension<sup>13</sup>.

The OFT may by notice to the person who gave the merger notice extend the period for considering a merger notice if the OFT or the Secretary of State is seeking certain undertakings<sup>14</sup>. This extension is for the period beginning with the receipt of the notice and ending with the earliest of the following events: (1) the giving of the undertakings concerned; (2) the expiry of the period of ten days beginning with the first day after the receipt by the OFT of a notice from the person from whom the undertakings are being sought stating that he does not intend to give the undertakings; or (3) the cancellation by the OFT of the extension<sup>15</sup>.

The Secretary of State may by notice to the person who gave the merger notice extend the period for considering a merger notice if he decides to delay a decision<sup>16</sup> as to whether to make a reference to the Competition Commission<sup>17</sup>. The OFT may by notice to the person who gave the merger notice extend the period for considering a merger notice if the European Commission is considering a request made, in relation to the matter concerned, by the United Kingdom (whether alone or with others) (but is not yet proceeding with the matter in pursuance of such a request)<sup>18</sup>.

Where the period for considering a merger notice is extended or further extended as described above<sup>19</sup>, the period as extended or (as the case may be) further extended is calculated by taking the period being extended and adding to it the period of the extension (whether or not those periods overlap in time)<sup>20</sup>.

1 As to the meaning of 'merger notice' see PARA 247.

2 As to the OFT see PARAS 6-8.

3 I.e. any fee payable by virtue of the Enterprise Act 2002 s 121 (see PARA 272). For the time at which fees are to be treated as paid see the Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 13.

4 Enterprise Act 2002 s 97(1). In determining any period which is expressed in the enactment concerned as a period of days or number of days no account is to be taken of Saturday, Sunday, Good Friday, Christmas Day and any day which is a bank holiday in England and Wales: s 98(3).

5 As to the meaning of 'intervention notice' see PARA 189 note 11.

6 Enterprise Act 2002 s 97(2). A notice under s 97(2) must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 98(1). Any reference in Pt 3 (apart from in ss 97(1), 99(1)) to the period for considering a merger notice is, if that period is extended by virtue of any one or more of s 97(2), (3), (4) (5), (7), (9), (11) in relation to a particular case, to be construed in relation to that case as a reference to that period as so extended; but only one extension is possible under s 97(2), (3) or s 97(4): s 98(4).

7 Enterprise Act 2002 s 97(3). A notice under s 97(3) must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 98(1). See note 6.

8 I.e. under the Enterprise Act 2002 s 97(2).

9 See note 8.

10 Enterprise Act 2002 s 97(4). A notice under s 97(4) must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 98(1). See note 6.

11 I.e. within the period stated in a notice under the Enterprise Act 2002 s 99(2) and in the authorised or required manner (see PARA 249).

12 Enterprise Act 2002 s 97(5). A notice under s 97(5) must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 98(1). A notice under s 97(5) must also be given within five days of the end of the period within which the information is to be provided and which is stated in the notice under s 99(2) (see PARA 249), and must also inform the person who gave the merger

notice of: (1) the OFT's opinion as mentioned in s 97(5); and (2) the OFT's intention to extend the period for considering a merger notice: s 98(2).

13 Enterprise Act 2002 s 97(6). In these circumstances, the OFT must inform the person who gave the merger notice, or a person acting on his behalf: (1) of the fact that it is satisfied as to the provision of the information requested by it or (as the case may be) of its decision to cancel the extension; and (2) of the time at which it is to be treated as so satisfied or (as the case may be) of the time at which the cancellation is to be treated as having effect: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 9.

14 Enterprise Act 2002 s 97(7). This applies where the OFT is seeking undertakings under the Enterprise Act 2002 s 73 (see PARA 217) or (as the case may be) the Secretary of State is seeking undertakings under Sch 7 para 3 (see PARA 229): s 97(7). A notice under s 97(7) must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 98(1). As to the Secretary of State see PARA 5. A notice given to the person who gave the merger notice, or a person acting on his behalf, under s 97(7) is to be treated as having been received by that person on the day on which it is in fact received by that person; except that where it is received by that person on any day which is not a working day or after 5.00 pm on any working day, it is to be treated as having been received on the next working day, and the Interpretation Act 1978 s 7 does not apply: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 12.

15 Enterprise Act 2002 s 97(8). In these circumstances, the OFT must inform the person who gave the merger notice, or a person acting on his behalf of any decision by it to cancel the extension, and of the time at which such a cancellation is to be treated as having effect: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 10. A notice given to the OFT under the Enterprise Act 2002 s 97(8) is to be treated as having been received by it on the day on which it is in fact received by the OFT; except that where it is received by the OFT on any day which is not a working day or after 5.00 pm on any working day, it is to be treated as having been received on the next working day, and the Interpretation Act 1978 s 7 does not apply: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 11.

16 le under the Enterprise Act 2002 Sch 7 para 3(6) (see PARA 229).

17 Enterprise Act 2002 s 97(9). This refers to a reference by the Secretary of State to the Commission under s 45 (see PARA 193). As to the Competition Commission see PARAS 9-12. An extension under s 97(9) is for the period of the delay: s 97(10). A notice under s 97(9) must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 98(1).

18 Enterprise Act 2002 s 97(11) (amended by SI 2004/1079). This refers to a request made under art 22(1) of EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') (see PARA 74). A notice under the Enterprise Act 2002 s 97(11) must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 98(1). The OFT must, in connection with any notice given by it under the Enterprise Act 2002 s 97(11), by notice inform the person who gave the merger notice of the completion by the European Commission of its consideration of the request of the United Kingdom: s 97(13). As to the meaning of 'United Kingdom' see PARA 401 note 1. An extension under s 97(11) is for the period beginning with the receipt of the notice under s 97(11) and ending with the receipt of a notice under s 97(13): s 97(12). A notice given to the person who gave the merger notice, or a person acting on his behalf, under s 97(11) or s 97(13) is to be treated as having been received by that person on the day on which it is in fact received by that person; except that where it is received by that person on any day which is not a working day or after 5.00 pm on any working day, it is to be treated as having been received on the next working day, and the Interpretation Act 1978 s 7 does not apply: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 12.

19 le by virtue of the Enterprise Act 2002 s 97 (see the text and notes 1-18).

20 Enterprise Act 2002 s 98(5). This applies where: (1) the period for considering a merger notice is further extended; (2) the further extension and at least one previous extension is made under one or more of s 97(5), (7), (9), (11); and (3) the same days or fractions of days are included in or comprise the further extension and are included in or comprise at least one such previous extension: s 98(6). In calculating the period of the further extension, any days or fractions of days of the kind mentioned in head (3) are to be disregarded: s 98(7).

## 249. Functions of the Office of Fair Trading and Secretary of State.

The Office of Fair Trading (the 'OFT')<sup>1</sup> must, so far as practicable and when the period for considering any merger notice<sup>2</sup> begins, take such action as the OFT considers appropriate to bring:

- (1) the existence of the proposal;
- (2) the fact that the merger notice has been given; and
- (3) the date on which the period for considering the notice may expire,

to the attention of those whom the OFT considers would be affected if the arrangements were carried into effect<sup>3</sup>.

The OFT may by notice to the person who gave the merger notice request him to provide the OFT with such information as the OFT or (as the case may be) the Secretary of State<sup>4</sup> may require for the purpose of carrying out its or (as the case may be) his functions in relation to the merger notice<sup>5</sup>.

The OFT may, at any time before the end of the period for considering any merger notice, reject the notice<sup>6</sup> if:

- (a) the OFT suspects that any information given in respect of the notified arrangements<sup>7</sup> (whether in the merger notice or otherwise) by the person who gave the notice or any connected person is in any material respect false or misleading<sup>8</sup>;
- (b) the OFT suspects that it is not proposed to carry the notified arrangements into effect<sup>9</sup>;
- (c) any prescribed information is not given in the merger notice or any information requested by notice<sup>10</sup> is not provided as required<sup>11</sup>; or
- (d) the OFT considers that the notified arrangements are, or if carried into effect would result in, a concentration with a Community dimension<sup>12</sup>.

The Secretary of State may, for the purposes of determining the effect of giving a merger notice and the action which may be or is to be taken by any person in connection with such a notice, by order modify the relevant statutory provisions<sup>13</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the meaning of 'merger notice' see PARA 247. As to the period for considering merger notices see PARA 248.

3 Enterprise Act 2002 s 99(1).

4 As to the Secretary of State see PARA 5.

5 Enterprise Act 2002 s 99(2). See the Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 9; and PARA 248. A notice under s 99(2) must state: (1) the information required; (2) the period within which the information is to be provided; and (3) the possible consequences of not providing the information within the stated period and in the authorised or required manner: s 99(3). The notice must be given, before the end of the period for considering the merger notice, to the person who gave the merger notice: s 99(4).

Any information which:

- (a) is, or ought to be, known to the person who gave the merger notice or any connected person; and
- (b) is material to the notified arrangements,

or any information requested by the OFT under s 99(2) must be provided or disclosed in writing: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 8(1). Any information provided or disclosed to the OFT under this regulation is to be treated as having been so provided or disclosed on the day on which it is in fact received by the OFT (reg 8(2)); except that where information provided or disclosed to the OFT is received by the OFT on any day which is not a working day or after 5.00 pm on any working day, it is to be treated as having been provided or disclosed to the OFT on the next working day (reg 8(3)). The Interpretation Act 1978 s 7 does not apply in these circumstances: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 8(4). Any information requested by the OFT under the Enterprise Act 2002 is to be treated as provided to the satisfaction of the OFT, for the purposes of s 97(6), on the day on which the OFT informs the person who gave the merger notice, or a person acting on his behalf, of the fact that it is satisfied as to the provision of the information requested by it: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 8(5).

6 A rejection of a merger notice under the Enterprise Act 2002 s 99(5) must be given in writing and such a notice is to be treated as having been rejected at the time when the rejection is sent to the person who gave the merger notice or a person acting on his behalf: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 6.

7 As to the meaning of 'notified arrangements' see PARA 247 note 1.

8 Enterprise Act 2002 s 99(5)(a). For these purposes, 'connected person', in relation to the person who gave a merger notice, means (1) any person who, for the purposes of s 127, is associated with him; or (2) any subsidiary of the person who gave the merger notice or of any person so associated with him: s 99(6).

9 Enterprise Act 2002 s 99(5)(b).

10 Ie a notice under the Enterprise Act 2002 s 99(2).

11 Enterprise Act 2002 s 99(5)(c).

12 Enterprise Act 2002 s 99(5)(d). This refers to a Community dimension within the meaning of the EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') (see PARA 74).

13 Enterprise Act 2002 s 102. The provisions which may be modified are ss 97-101 (see PARAS 248, 250-251).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(v) Merger Notices/250. Exceptions to protection given by merger notices.

## 250. Exceptions to protection given by merger notices.

Certain references to the Competition Commission<sup>1</sup> are not permitted if the period for considering the merger notice<sup>2</sup> has expired without a reference being made in relation to those arrangements<sup>3</sup>. However, this does not prevent references being made to the Commission if certain conditions are met<sup>4</sup>. A reference may still be made to the Commission if:

- (1) before the end of the period for considering the merger notice, the Office of Fair Trading (the 'OFT') rejects the notice<sup>5</sup>;
- (2) before the end of that period, any of the enterprises to which the notified arrangements relate cease to be distinct from each other<sup>6</sup>;
- (3) any information (whether prescribed information or not) that (a) is, or ought to be, known to the person who gave the merger notice or any connected person; and (b) is material to the notified arrangements, is not disclosed to the OFT by such time before the end of that period as may be specified in regulations<sup>7</sup>;
- (4) at any time after the merger notice is given but before the enterprises to which the notified arrangements relate cease to be distinct from each other, any of

those enterprises ceases to be distinct from any enterprise other than an enterprise to which those arrangements relate<sup>8</sup>;

(5) the six months beginning with the end of the period for considering the merger notice expires without the enterprises to which the notified arrangements relate ceasing to be distinct from each other<sup>9</sup>;

(6) the merger notice is withdrawn<sup>10</sup>; or

(7) any information given in respect of the notified arrangements (whether in the merger notice or otherwise) by the person who gave the notice or any connected person is in any material respect false or misleading<sup>11</sup>.

Where (a) two or more transactions which have occurred (or, if any arrangements are carried into effect, will occur) may be treated for the purposes of a reference<sup>12</sup> to the Commission as having occurred simultaneously on a particular date; and (b) the statutory prohibition<sup>13</sup> does not prevent such a reference in relation to the last of those transactions, then a reference is not prevented in relation to any of those transactions which actually occurred less than six months before (i) that date; or (ii) the actual occurrence of another of those transactions in relation to which such a reference may be made<sup>14</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 As to the meaning of 'merger notice' see PARA 247. As to the period for considering merger notices see PARA 248.

3 See the Enterprise Act 2002 s 96(3). No reference may be made under the Enterprise Act 2002 s 22, s 33 or s 45 in relation to:

(1) arrangements of which notice is given under s 96(1) or arrangements which do not differ from them in any material respect; or

(2) the creation of any relevant merger situation which is, or may be, created in consequence of carrying such arrangements into effect,

if the period for considering the merger notice has expired without a reference being made under that section in relation to those arrangements: s 96(3).

4 See the Enterprise Act 2002 ss 96(4), 100.

5 Enterprise Act 2002 s 100(1)(a). This refers to rejection under s 99(5) (see PARA 249). As to the OFT see PARAS 6-8.

6 Enterprise Act 2002 s 100(1)(b). As to the meaning of 'enterprise' see PARA 173 note 2. As to the meaning of 'notified arrangements' see PARA 247 note 1. References to the enterprises to which the notified arrangements relate are references to those enterprises that would have ceased to be distinct from one another if the arrangements mentioned in the merger notice concerned had been carried into effect at the time when the notice was given: s 100(5).

7 Enterprise Act 2002 s 100(1)(c). The time specified for the purpose of s 100(1)(c) is five working days: Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, reg 4.

8 Enterprise Act 2002 s 100(1)(d).

9 Enterprise Act 2002 s 100(1)(e).

10 Enterprise Act 2002 s 100(1)(f).

11 Enterprise Act 2002 s 100(1)(g).

12 Ie a reference under the Enterprise Act 2002 s 22, s 33 or s 45 (see PARAS 172, 182, 193).

13 Ie the Enterprise Act 2002 s 96(3) (see note 3).



14 Enterprise Act 2002 s 100(2), (3). In determining for these purposes the time at which any transaction actually occurred, no account is to be taken of any option or other conditional right until the option is exercised or the condition is satisfied: s 100(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(v) Merger Notices/251. Regulations.

## 251. Regulations.

The Secretary of State<sup>1</sup> has power to make regulations relating to merger notices<sup>2</sup>. The regulations may, in particular, make provision relating to: (1) references to periods of time<sup>3</sup>; (2) the manner in which merger notices are authorised or required to be rejected or withdrawn<sup>4</sup>; (3) the time at which notices are to be treated as received<sup>5</sup>; (4) the provision of information<sup>6</sup>; and (5) the circumstances in which a person may be treated as acting on behalf of a person authorised to give a merger notice<sup>7</sup>.

1 As to the Secretary of State see PARA 5.

2 He has power to make regulations for the purposes of the Enterprise Act 2002 ss 96-100 (see PARA 247 et seq): s 101(1). In exercise of this power the Enterprise Act 2002 (Merger Prenotification) Regulations 2003, SI 2003/1369, have been made. As to the meaning of 'merger notice' see PARA 247.

3 See the Enterprise Act 2002 s 101(2)(a), (g).

4 See the Enterprise Act 2002 s 101(2)(b).

5 See the Enterprise Act 2002 s 101(2)(c).

6 See the Enterprise Act 2002 s 101(2)(d), (e), (f).

7 See the Enterprise Act 2002 s 101(2)(h).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(vi) General Duties in relation to References/252. Duty of expedition.

## (vi) General Duties in relation to References

### 252. Duty of expedition.

In deciding whether to make a reference to the Competition Commission<sup>1</sup> in relation to a completed merger<sup>2</sup> or an anticipated merger<sup>3</sup> the Office of Fair Trading (the 'OFT')<sup>4</sup> must have regard, with a view to the prevention or removal of uncertainty, to the need for making a decision as soon as reasonably practicable<sup>5</sup>. The Secretary of State<sup>6</sup> has a corresponding duty of expedition in deciding whether to make a reference<sup>7</sup> to the Commission<sup>8</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 He under the Enterprise Act 2002 s 22 (see PARA 172).

- 3      le under the Enterprise Act 2002 s 33 (see PARA 182).
- 4      As to the OFT see PARAS 6-8.
- 5      Enterprise Act 2002 s 103(1).
- 6      As to the Secretary of State see PARA 5.
- 7      le under the Enterprise Act 2002 s 45 (see PARA 193) or s 62 (see PARA 208).
- 8      See the Enterprise Act 2002 s 103(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(vi) General Duties in relation to References/253. Duty to consult.

### **253. Duty to consult.**

Where the relevant authority (whether it is the Office of Fair Trading, the Competition Commission or the Secretary of State)<sup>1</sup> is proposing to make a relevant decision<sup>2</sup> in a way which the relevant authority considers is likely to be adverse to the interests of a relevant party<sup>3</sup>, then the relevant authority must, so far as practicable, consult that party about what is proposed before making that decision<sup>4</sup>. In consulting the party concerned, the relevant authority must, so far as practicable, give the reasons of the relevant authority for the proposed decision<sup>5</sup>. In considering what is practicable for these purposes the relevant authority must, in particular, have regard to: (1) any restrictions imposed by any timetable for making the decision; and (2) any need to keep what is proposed, or the reasons for it, confidential<sup>6</sup>.

1      As to the OFT see PARAS 6-8. As to the Competition Commission see PARAS 9-12. As to the Secretary of State see PARA 5.

2      In the case of the OFT, 'relevant decision' means any decision by the OFT (1) as to whether to make a reference under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182) or to accept undertakings under s 73 (see PARA 217) instead of making such a reference; or (2) to vary under s 37 (see PARA 185) such a reference: s 104(6)(a). In the case of the Commission, 'relevant decision' means any decision on the questions mentioned in ss 35(1), (3), 36(1), (2), 47 or s 63 (see PARAS 184, 195, 209): s 104(6)(b). In the case of the Secretary of State, 'relevant decision' means any decision by the Secretary of State (a) as to whether to make a reference under s 45 (see PARA 193) or s 62 (see PARA 208); or (b) to vary under s 49 or (as the case may be) s 64 such a reference: s 104(6)(c).

3      Enterprise Act 2002 s 104(1). 'Relevant party' means any person who appears to the relevant authority to control enterprises which are the subject of the reference or possible reference concerned: s 104(6).

4      Enterprise Act 2002 s 104(2). This duty of consultation does not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of Pt 3 (ss 22-130) for consultation before the making of that decision: s 104(5). As to the requirement to consult the public in relation to media mergers see PARA 269.

5      Enterprise Act 2002 s 104(3).

6      Enterprise Act 2002 s 104(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(vii) Information and Publicity Requirements/254. General information duties of the Office of Fair Trading and the Commission.

## **(vii) Information and Publicity Requirements**

### **254. General information duties of the Office of Fair Trading and the Commission.**

Where the Office of Fair Trading (the 'OFT')<sup>1</sup> decides to investigate a matter so as to enable it to decide whether to make a reference to the Competition Commission<sup>2</sup>, or so as to make a report to the Secretary of State<sup>3</sup>, it must, so far as practicable, take such action as it considers appropriate to bring information about the investigation to the attention of those whom it considers might be affected by the creation of the relevant merger situation<sup>4</sup> concerned or (as the case may be) the special merger situation concerned<sup>5</sup>. Similarly, where the Office of Communications ('OFCOM') decides to investigate a matter so as to make a report to the Secretary of State<sup>6</sup>, it must, so far as practicable, take such action as it considers appropriate to bring information about the investigation to the attention of those who it considers might be affected by the creation of the relevant merger situation concerned or (as the case may be) the special merger situation concerned<sup>7</sup>. However there is no such requirement for the OFT or OFCOM to do so in relation to arrangements which might result in the creation of a relevant merger situation if a merger notice has been given<sup>8</sup> in relation to those arrangements<sup>9</sup>.

The OFT must give the Commission or OFCOM such information in its possession as the Commission or (as the case may be) OFCOM may reasonably require to enable the Commission or OFCOM to carry out its functions under Part 3 of the Enterprise Act 2002<sup>10</sup>. The OFT must also give any other assistance to the Commission or OFCOM which it may reasonably require for the purpose of assisting it in carrying out its functions under Part 3 of the Act and which it is within the power of the OFT to give<sup>11</sup>. OFCOM is under a corresponding duty to give the Commission or the OFT such information and assistance as may reasonably be required<sup>12</sup>.

The OFT must give the Commission or OFCOM any information in its possession which has not been requested by the Commission or (as the case may be) OFCOM but which, in the opinion of the OFT, would be appropriate to give to them for the purpose of assisting them in carrying out their functions under Part 3 of the Act<sup>13</sup>. OFCOM is under a corresponding duty to give the Commission or the OFT such information in its possession too<sup>14</sup>.

The OFT, OFCOM and the Commission must give the Secretary of State such information in their possession as the Secretary of State may by direction reasonably require to enable him to carry out his functions under Part 3 of the Act, and they must also give him any other assistance which he may by direction reasonably require for the purpose of assisting him in carrying out those functions and which it is within the power of the OFT, OFCOM or (as the case may be) the Commission to give<sup>15</sup>. The OFT and OFCOM must give the Secretary of State any information in their possession which has not been requested by the Secretary of State but which, in the opinion of the OFT or (as the case may be) OFCOM, would be appropriate to give to the Secretary of State for the purpose of assisting him in carrying out his functions under Part 3 of the Act<sup>16</sup>.

The Commission, the Secretary of State, OFCOM and the OFT must have regard to any information provided to them as described above<sup>17</sup>.

<sup>1</sup> As to the OFT see PARAS 6-8.

<sup>2</sup> Ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182). As to the Competition Commission see PARAS 9-12.

- 3       le under the Enterprise Act 2002 s 44 (see PARA 191) or s 61 (see PARA 206). As to the Secretary of State see PARA 5.
- 4       As to the meaning of 'relevant merger situation' see PARA 173.
- 5       Enterprise Act 2002 s 105(1). As to the meaning of 'special merger situation' see PARA 204.
- 6       le under the Enterprise Act 2002 s 44A (see PARA 192) or s 61A (see PARA 207).
- 7       Enterprise Act 2002 s 105(1A) (added by the Communications Act 2003 s 382).
- 8       le under the Enterprise Act 2002 s 96 (see PARA 247). As to the meaning of 'merger notice' see PARA 247.
- 9       Enterprise Act 2002 s 105(2) (amended by the Communications Act 2003 s 382).
- 10       Enterprise Act 2002 s 105(3)(a) (amended by the Communications Act 2003 s 382).
- 11       Enterprise Act 2002 s 105(3)(b) (amended by the Communications Act 2003 s 382).
- 12       See the Enterprise Act 2002 s 105(3A) (added by the Communications Act 2003 s 382).
- 13       Enterprise Act 2002 s 105(4) (amended by the Communications Act 2003 s 382).
- 14       See the Enterprise Act 2002 s 105(4A) (added by the Communications Act 2003 s 382).
- 15       Enterprise Act 2002 s 105(5) (amended by the Communications Act 2003 s 382). Any such direction must be given in writing, and may be varied or revoked by a subsequent direction: Enterprise Act 2002 s 105(8).
- 16       Enterprise Act 2002 s 105(6) (amended by the Communications Act 2003 s 382).
- 17       See the Enterprise Act 2002 s 105(7) (amended by the Communications Act 2003 s 382), Enterprise Act 2002 s 105(7A) (amended by the Communications Act 2003 s 382).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(vii) Information and Publicity Requirements/255. Advice and information about references.

## **255. Advice and information about references.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> must prepare and publish general advice and information about the making of references<sup>2</sup> by it, which may at any time be revised and republished<sup>3</sup>. The Competition Commission<sup>4</sup> must prepare and publish general advice and information about the consideration by it of such references and the way in which relevant customer benefits may affect the taking of enforcement action in relation to such references<sup>5</sup>. This advice and information may at any time be revised and republished<sup>6</sup>.

Advice and information published by the OFT or the Commission must be prepared with a view to explaining the relevant provisions of Part 3 of the Enterprise Act 2002<sup>7</sup> to persons who are likely to be affected by them, and with a view to indicating how the OFT or (as the case may be) the Commission expects such provisions to operate<sup>8</sup>. The advice or information may include advice or information about the factors which the OFT or (as the case may be) the Commission may take into account in considering whether, and if so how, to exercise a function conferred by Part 3 of the Act<sup>9</sup>.

In preparing the advice and information, the OFT and the Commission are each under a duty to consult the other, as well as such other persons they consider appropriate<sup>10</sup>. It must then be published in such manner as the OFT or (as the case may be) the Commission considers appropriate<sup>11</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

3 Enterprise Act 2002 s 106(1), (2). Advice and information published by the OFT by virtue of s 106(1) must, in particular, include advice and information about the circumstances in which the duties of the OFT under ss 22, 33 do not apply as a result of EC Council Regulation 139/2004 (OJ L24, 29.1.2004, p 1) (the 'EC Merger Regulation') or anything done under or in accordance with them: Enterprise Act 2002 s 122(2).

As to advice and information prepared and published by the Secretary of State in connection with media mergers see s 106A; and PARA 270.

4 As to the Competition Commission see PARAS 9-12.

5 Enterprise Act 2002 s 106(3).

6 Enterprise Act 2002 s 106(4).

7 Ie the Enterprise Act 2002 Pt 3 (ss 22-130).

8 Enterprise Act 2002 s 106(5).

9 Enterprise Act 2002 s 106(6). Advice and information published by virtue of s 106(1) or s 106(3) must include such advice and information about the effect of Community law, and anything done under or in accordance with it, on the provisions of Pt 3 as the OFT or (as the case may be) the Commission considers appropriate: s 122(1).

10 Enterprise Act 2002 s 106(8), (9).

11 Enterprise Act 2002 s 106(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(vii) Information and Publicity Requirements/256. General advisory functions of OFCOM.

## **256. General advisory functions of OFCOM.**

The Office of Communications ('OFCOM')<sup>1</sup> may, in connection with any case on which it is required to give a report to the Secretary of State<sup>2</sup>, give such advice as it considers appropriate to the Secretary of State in relation to (1) any report made in such a case by the Competition Commission<sup>3</sup>; and (2) the taking by the Secretary of State of enforcement action<sup>4</sup>. OFCOM may, if requested to do so by the Secretary of State, give such other advice as it considers appropriate to the Secretary of State in connection with any case on which it is required to give a report<sup>5</sup>.

1 As to OFCOM see PARA 19.

2 Ie by virtue of the Enterprise Act 2002 s 44A (see PARA 192) or s 61A (see PARA 207). As to the Secretary of State see PARA 5.

3 Ie under the Enterprise Act 2002 s 50 (see PARA 198) or s 65 (see PARA 211). As to the Competition Commission see PARAS 9-12. OFCOM must publish any advice given by it under s 106B but advice given by it in relation to a report of the Commission under s 50 or s 65 or related enforcement action must not be published before the report itself is published: s 106B(3) (s 106B added by the Communications Act 2003 s 384).

4 Enterprise Act 2002 s 106B(1) (as added: see note 3). As to enforcement action under the Enterprise Act 2002 Sch 7 see PARAS 228-231.

5 Enterprise Act 2002 s 106B(2) (as added: see note 3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(vii) Information and Publicity Requirements/257. Further publicity requirements.

## **257. Further publicity requirements.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> is under a duty to publish (1) specified references made by it<sup>2</sup>; (2) any variations of such references<sup>3</sup>; (3) information relating to decisions to bring cases to the attention of the Secretary of State<sup>4</sup>; (4) certain enforcement undertakings accepted by it<sup>5</sup>; (5) certain enforcement orders<sup>6</sup>; (6) any variation, release or revocation of such an undertaking or order<sup>7</sup>; and (7) certain decisions it has made<sup>8</sup>.

The Competition Commission<sup>9</sup> is under a duty to publish: (a) certain cancellations it has made<sup>10</sup>; (b) certain extensions of time periods it has made<sup>11</sup>; (c) certain enforcement orders it has made<sup>12</sup>; (d) certain enforcement undertakings it has accepted<sup>13</sup>; (e) any variation, release or revocation of such orders or undertakings<sup>14</sup>; and (f) certain decisions it has made<sup>15</sup>;

The Secretary of State<sup>16</sup> is under a duty to publish: (i) any intervention notice or special intervention notice given by him<sup>17</sup>; (ii) reports of the OFT which have been received by him<sup>18</sup>; (iii) reports of OFCOM which have been received by him<sup>19</sup>; (iv) certain references made by him to the OFT or any decision made by him not to make such a reference<sup>20</sup>; (iv) any variation made by him of such references<sup>21</sup>; (v) reports of the Commission which have been received by him<sup>22</sup>; (vi) notices given by him<sup>23</sup>; (vii) certain enforcement undertakings accepted by him and any variation or release of such an undertaking<sup>24</sup>; and (viii) certain decisions made by him<sup>25</sup>. The Secretary of State must publish his reasons for certain decisions that he makes<sup>26</sup>. He is also under a duty to publish certain reports within specified time limits<sup>27</sup>.

Where any person is under a duty<sup>28</sup> to publish the result of any action taken by that person or any decision made by that person, the person concerned must also publish that person's reasons for the action concerned or (as the case may be) the decision concerned<sup>29</sup>. However, such reasons need not, if it is not reasonably practicable to do so, be published at the same time as the result of the action concerned or (as the case may be) as the decision concerned<sup>30</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie any reference made by it under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182) or any decision made by it not to make such a reference (other than a decision made by virtue of s 33(2)(b)): s 107(1)(a).

3 Ie any variation made by it under the Enterprise Act 2002 s 37 of a reference under s 22 or s 33: s 107(1)(b).

4 Ie such information as it considers appropriate about any decision made by it under the Enterprise Act 2002 s 57(1) to bring a case to the attention of the Secretary of State: s 107(1)(c). As to the Secretary of State see PARA 5.

5 Ie any enforcement undertaking accepted by it under the Enterprise Act 2002 s 71 (see PARA 215): s 107(1)(d).

6 Ie any enforcement order made by it under the Enterprise Act 2002 s 72 or s 76 or Sch 7 para 2 (see PARAS 216, 220, 228): s 107(1)(e).

7 Enterprise Act 2002 s 107(1)(f).

8       le any decision made by it as mentioned in the Enterprise Act 2002 s 76(6)(b) (s 107(1)(g)) and any decision made by it to dispense with the requirements of Sch 10 (see s 107(1)(h)).

9       As to the Competition Commission see PARAS 9-12.

10       le (1) any cancellation by it under the Enterprise Act 2002 s 37(1) (see PARA 185) of a reference under s 33 (s 107(2)(a)); (2) any cancellation by it under s 48(1) or s 53(1) (see PARAS 196, 199) of a reference under s 45 or any cancellation by it under s 64(1) (see PARA 210) of a reference under s 62 (s 107(2)(g)).

11       le (1) any extension by it under the Enterprise Act 2002 s 39 of the period within which a report under s 38 is to be prepared and published (see PARAS 186-187) (s 107(2)(c)); (2) any extension by it under s 51 of the period within which a report under s 50 is to be prepared and published (see PARA 198) (s 107(2)(i)); (3) any extension by it under s 51 as applied by s 65(3) of the period within which a report under s 65 is to be prepared and published (see PARA 211) (s 107(2)(k)).

12       le any enforcement order made by it under the Enterprise Act 2002 s 76 or s 81 (see PARAS 220, 224): s 107(2)(o).

13       le any enforcement undertaking accepted by it under the Enterprise Act 2002 s 80 (see PARA 223): s 107(2)(p).

14       le any variation, release or revocation of any enforcement order made by it under the Enterprise Act 2002 s 76 or s 81 or any enforcement undertaking accepted by it under s 80: s 107(2)(o), (p), (q).

15       le (1) any decision made by the Commission under the Enterprise Act 2002 s 37(2) to treat a reference made under s 22 (see PARA 172) or s 33 (see PARA 182) as if it had been made under s 33 or (as the case may be) s 22 (s 107(2)(b)); (2) any decision made by the Commission to cancel an extension of the time period as mentioned in s 39(8)(b) (see PARA 187) (s 107(2)(d)); (3) any decision made by the Commission under s 41(2) neither to accept an undertaking under s 82 nor to make an order under s 84 (see PARA 226) (s 107(2)(e)); (4) any decision made by the Commission that there has been a material change of circumstances as mentioned in s 41(3) (see PARA 188) or there is another special reason as mentioned in s 41(3) (s 107(2)(f)); (5) any decision made by the Commission under s 49(1) to treat (a) a reference made under s 45(2) or s 45(3) as if it had been made under s 45(4) or (as the case may be) s 45(5) (see PARA 193); or (b) a reference made under s 45(4) or s 45(5) as if it had been made under s 45(2) or (as the case may be) s 45(3) (s 107(2)(h)); (6) any decision made by the Commission under s 51(8)(b) (see PARA 198) to cancel an extension of the period within which a report under s 50 (see PARA 198) is to be prepared and published (s 107(2)(j)); (7) any decision made by the Commission under s 51(8)(b) as applied by s 65(3) to cancel an extension of the period within which a report under s 65 is to be prepared and published (see PARA 211) (s 107(2)(l)); (8) any decision made by the Commission under s 64(2) to treat a reference made under s 62(2) or s 62(3) as if it had been made under s 62(3) or (as the case may be) s 62(2) (see PARA 208) (s 107(2)(m)); (9) any decision made by the Commission as mentioned in s 76(6)(b) (see PARA 220) (s 107(2)(n)); (10) any decision made by it to dispense with the requirements of Sch 10 (see PARA 241) (s 107(2)(r)).

16       As to the Secretary of State see PARA 5.

17       Enterprise Act 2002 s 107(3)(a). As to the meaning of 'intervention notice' see PARA 189 note 11. As to the meaning of 'special intervention notice' see PARA 204.

18       le any report of the OFT under the Enterprise Act 2002 s 44 (see PARA 191) or s 61 (see PARA 206): s 107(3)(b).

19       le any report under the Enterprise Act 2002 s 44A (see PARA 192) or s 61A (see PARA 207): s 107(3)(ba) (added by the Communications Act 2003 Sch 16 para 18(1), (2)).

20       le any reference under the Enterprise Act 2002 s 45 (see PARA 193) or s 62 (see PARA 208): s 107(3)(c).

21       le any variation made by him under the Enterprise Act 2002 s 49 of a reference under s 45 or under s 64 of a reference under s 62 (see PARA 208): s 107(3)(d).

22       le any report of the Commission under the Enterprise Act 2002 s 50 (see PARA 198) or s 65 (see PARA 211): s 107(3)(e).

23       le any notice given by him under the Enterprise Act 2002 s 56(1) (see PARA 202): s 107(3)(g).

24       le any enforcement undertaking accepted by him under the Enterprise Act 2002 Sch 7 para 1 (see PARA 228) and any variation of release of such an undertaking: s 107(3)(h), (i).

25 le (1) any decision made by the Secretary of State neither to accept an undertaking under the Enterprise Act 2002 Sch 7 para 9 nor to make an order under Sch 7 para 11 (see PARA 231) (s 107(3)(f)); (2) any decision made by him as mentioned in Sch 7 para 6(6)(b) (see PARA 229) (s 107(3)(j)); and (3) any decision made by him to dispense with the requirements of Sch 10 (see PARA 241) (s 107(3)(k)). Where the Secretary of State has decided under s 55(2) or s 66(6) to accept an undertaking under Sch 7 para 9 or to make an order under Sch 7 para 11, he must (after the acceptance of the undertaking or (as the case may be) the making of the order) lay details of his decision and his reasons for it, and the Commission's report under s 50 or (as the case may be) s 65, before each House of Parliament: ss 107(11), 118(5).

26 le he must publish the reasons for (1) any decision made by him under the Enterprise Act 2002 s 54(2) or s 66(2) (see PARAS 200, 212) (s 107(7)(a)); or (2) any decision to make an order under s 58(3) or vary or revoke such an order (see PARA 203) (s 107(7)(b)). If it is not reasonably practicable to publish the reasons at the same time as the publication of the decision or (as the case may be) the making of the order or variation or revocation, then such reasons may be published after the publication of the decision concerned (in the case of s 107(7)(a)) and after the making of the order or of the variation or revocation (in the case of s 107(7)(b)): s 107(8).

27 The Secretary of State must publish the report of the OFT under the Enterprise Act 2002 s 44, and any report of OFCOM under s 44A, in relation to a matter no later than publication of his decision as to whether to make a reference under s 45 in relation to that matter: s 107(9)(a) (amended by the Communications Act 2003 Sch 16 para 18). He must publish the report of the Commission under the Enterprise Act 2002 s 50 in relation to a matter no later than publication of his decision under s 54(2) in relation to that matter: s 107(9)(b). He must publish the report of the OFT under s 61, and any report of OFCOM under s 61A, in relation to a matter no later than publication of his decision as to whether to make a reference under s 62 in relation to that matter: s 107(10)(a) (amended by the Communications Act 2003 Sch 16 para 18). He must publish the report of the Commission under s 65 in relation to a matter no later than publication of his decision under s 66(2) in relation to that matter: Enterprise Act 2002 s 107(10)(b).

28 le by virtue of the Enterprise Act 2002 s 107(1), (2) or s 107(3).

29 Enterprise Act 2002 s 107(4). Section 107(4), (5) does not apply in relation to any information published under s 107(1)(c) (see note 4): s 107(6).

30 Enterprise Act 2002 s 107(5). See note 27.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(vii) Information and Publicity Requirements/258. Defamation.

## 258. Defamation.

For the purposes of the law relating to defamation<sup>1</sup>, absolute privilege attaches to any advice, guidance, notice or direction given, or decision or report made, by the Office of Fair Trading (the 'OFT')<sup>2</sup>, the Office of Communications ('OFCOM')<sup>3</sup>, the Competition Commission<sup>4</sup> or the Secretary of State<sup>5</sup> in the exercise of any of their functions under Part 3<sup>6</sup> of the Enterprise Act 2002<sup>7</sup>.

1 See **LIBEL AND SLANDER**.

2 As to the OFT see PARAS 6-8.

3 As to OFCOM see PARA 19.

4 As to the Competition Commission see PARAS 9-12.

5 As to the Secretary of State see PARA 5.

6 le the Enterprise Act 2002 Pt 3 (ss 22-130).

7 Enterprise Act 2002 s 108.



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/259. Attendance of witnesses and production of documents.

## **(viii) Investigation Powers**

### **259. Attendance of witnesses and production of documents.**

The Competition Commission<sup>1</sup> may, for the purpose of any investigation on a reference made to it under Part 3 of the Enterprise Act 2002<sup>2</sup>, give notice to any person requiring him to attend at a time and place specified in the notice, and to give evidence to the Commission or a person nominated by the Commission for the purpose<sup>3</sup>. The Commission may, for the purpose of any investigation on a reference made to it under Part 3 of the Act, give notice to any person requiring him (1) to produce any documents which are specified or described in the notice, or fall within a category of document which is specified or described in the notice; and which are in that person's custody or under his control; and (2) to produce them at a time and place so specified and to a person so specified<sup>4</sup>. The Commission may, for the purpose of any investigation on a reference made to it under Part 3 of the Act, give notice to any person who carries on any business requiring him to supply to the Commission such estimates, forecasts, returns or other information as may be specified or described in the notice, and to supply them at a time and place, and in a form and manner, so specified and to a person so specified<sup>5</sup>. The Commission or any person nominated by it for the purpose may, for the purpose of any investigation on a reference made to it under Part 3 of the Act, take evidence on oath, and for that purpose may administer oaths<sup>6</sup>.

However, no person is required (a) to give any evidence or produce any documents which he could not be compelled to give or produce in civil proceedings before the court<sup>7</sup>; (b) to supply any information which he could not be compelled to supply in evidence in such proceedings<sup>8</sup>; or (c) to go more than 10 miles from his place of residence unless his necessary travelling expenses are paid or offered to him<sup>9</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 I.e. the Enterprise Act 2002 Pt 3 (ss 22-130).

3 Enterprise Act 2002 s 109(1). A notice under s 109 must include information about the possible consequences of not complying with the notice: s 109(4).

4 Enterprise Act 2002 s 109(2). The person to whom any document is produced in accordance with a notice under s 109 may, for the purpose of any investigation on a reference made to the Commission under Pt 3, copy the document so produced: s 109(6). Any reference in s 109 to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form: s 109(9).

5 Enterprise Act 2002 s 109(3).

6 Enterprise Act 2002 s 109(5).

7 Enterprise Act 2002 s 109(7)(a). 'Court' means, in relation to England and Wales or Northern Ireland, the High Court: s 109(10).

8 Enterprise Act 2002 s 109(7)(b).

9 Enterprise Act 2002 s 109(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/260. Enforcement of investigation powers; penalties.

## **260. Enforcement of investigation powers; penalties.**

Where the Competition Commission<sup>1</sup> considers that a person has, without reasonable excuse, failed to comply with any requirement of a notice requiring the attendance of witnesses or the production of documents<sup>2</sup>, it may impose a penalty<sup>3</sup>. Where the Commission considers that a person has intentionally obstructed or delayed another person in the exercise of his powers to take copies of documents produced<sup>4</sup>, it may impose a penalty<sup>5</sup>. However, no penalty may be imposed if more than four weeks have passed since the publication of the report of the Commission on the reference concerned<sup>6</sup>.

A person commits an offence if he intentionally alters, suppresses or destroys any document which he has been required to produce by a notice from the Commission<sup>7</sup>.

In deciding whether and, if so, how to proceed<sup>8</sup>, the Commission must have regard to the statement of policy which was most recently published<sup>9</sup> at the time when the failure concerned or (as the case may be) the obstruction or delay concerned occurred<sup>10</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 I.e a notice under the Enterprise Act 2002 s 109 (see PARA 259).

3 Enterprise Act 2002 s 110(1). A penalty imposed under s 110(1) is of such amount as the Commission considers appropriate: s 111(1). The amount may be a fixed amount, an amount calculated by reference to a daily rate or a combination of a fixed amount and an amount calculated by reference to a daily rate: s 111(2). No penalty imposed under s 110(1) may: (1) in the case of a fixed amount, exceed £20,000; (2) in the case of an amount calculated by reference to a daily rate, exceed £5,000; and (3) in the case of a fixed amount and an amount calculated by reference to a daily rate, exceed £20,000 and such £5,000 per day: s 111(4); Competition Commission (Penalties) Order 2003, SI 2003/1371, art 2. See also the Competition Commission (Water Industry) Penalties Order 2007, SI 2007/461. An order under the Enterprise Act 2002 s 111(4) may not specify (in the case of a fixed amount), an amount exceeding £30,000: s 111(7)(a). An order under s 111(4) may not specify (in the case of an amount calculated by reference to a daily rate) an amount per day exceeding £15,000: s 111(7)(b). An order under s 111(4) may not specify (in the case of a fixed amount and an amount calculated by reference to a daily rate), a fixed amount exceeding £30,000 and an amount per day exceeding £15,000: s 111(7)(c). Before making an order under s 111(4) the Secretary of State must consult the Commission and such other persons as he considers appropriate: s 111(8). In imposing a penalty by reference to a daily rate (a) no account is to be taken of any days before the service of the notice under s 112 (see PARA 261) on the person concerned; and (b) unless the Commission determines an earlier date (whether before or after the penalty is imposed), the amount payable ceases to accumulate at the beginning of (i) the day on which the requirement of the notice concerned under s 109 is satisfied or (as the case may be) the obstruction or delay is removed; or (ii) if earlier, the day on which the report of the Commission on the reference concerned is published (or, in the case of a report under s 50 or s 65, given) or, if no such report is published (or given) within the period permitted for that purpose by Pt 3 (ss 22-130), the latest day on which the report may be published (or given) within the permitted period: s 111(5).

The Commission may proceed (whether at the same time or at different times) under s 110(1) and s 39(4) (see PARA 187) or (as the case may be) s 51(4) (see PARA 198) (including that enactment as applied by s 65(3)) in relation to the same failure: s 110(2). The Commission may not proceed against a person under s 110(1) in relation to an act which constitutes an offence under s 110(5) if that person has been found guilty of that offence: s 110(8).

4 I.e in exercise of his powers under the Enterprise Act 2002 s 109(6) (see PARA 259).

5 Enterprise Act 2002 s 110(3). A penalty imposed under s 110(3) is of such amount as the Commission considers appropriate: s 111(1). This is a fixed amount: s 111(3). No such penalty imposed under s 110(3) may exceed £20,000: s 111(6); Competition Commission (Penalties) Order 2003, SI 2003/1371, art 2. See also the

Competition Commission (Water Industry) Penalties Order 2007, SI 2007/461. An order under the Enterprise Act 2002 s 111(6) may not specify (in the case of a fixed amount), an amount exceeding £30,000: s 111(7)(a). An order under s 111(6) may not specify (in the case of an amount calculated by reference to a daily rate) an amount per day exceeding £15,000: s 111(7)(b). An order under s 111(6) may not specify (in the case of a fixed amount and an amount calculated by reference to a daily rate), a fixed amount exceeding £30,000 and an amount per day exceeding £15,000: s 111(7)(c). Before making an order under s 111(6) the Secretary of State must consult the Commission and such other persons as he considers appropriate: s 111(8)

6 Enterprise Act 2002 s 110(4). But s 110(4) does not apply in relation to any variation or substitution of the penalty which is permitted by virtue of Pt 3 (ss 22-130): s 110(4).

7 Enterprise Act 2002 s 110(5). A person does not commit an offence under s 110(5) in relation to any act which constitutes a failure to comply with a notice under s 109 if the Commission has proceeded against that person under s 110(1) (see the text and note 3) in relation to that failure: s 110(6). A person who commits an offence under s 110(5) is liable on summary conviction, to a fine not exceeding the statutory maximum; and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 110(7). The Commission may not proceed against a person under s 110(1) in relation to an act which constitutes an offence under s 110(5) if that person has been found guilty of that offence: s 110(8). The reference in s 110 to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form; and the reference to suppressing a document includes a reference to destroying the means of reproducing information recorded otherwise than in legible form: s 110(10).

8 Ie under the Enterprise Act 2002 s 110(1) or s 110(3) (see notes 3, 5) or s 39(4) (see PARA 187) or s 51(4) (see PARA 198) (including that enactment as applied by s 65(3)).

9 Ie under the Enterprise Act 2002 s 116 (see PARA 265).

10 Enterprise Act 2002 s 110(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/261. Procedural requirements in relation to penalties.

## **261. Procedural requirements in relation to penalties.**

As soon as practicable after imposing a penalty<sup>1</sup>, the Competition Commission<sup>2</sup> must give notice of the penalty<sup>3</sup>, stating:

- (1) that the Commission has imposed a penalty on the person concerned<sup>4</sup>;
- (2) whether the penalty is of a fixed amount, of an amount calculated by reference to a daily rate or of both a fixed amount and an amount calculated by reference to a daily rate<sup>5</sup>;
- (3) the amount or amounts concerned and, in the case of an amount calculated by reference to a daily rate, the day on which the amount first starts to accumulate and the day or days on which it might cease to accumulate<sup>6</sup>;
- (4) the failure or (as the case may be) the obstruction or delay which the Commission considers gave it the power to impose the penalty<sup>7</sup>;
- (5) any other facts which the Commission considers justify the imposition of a penalty and the amount or amounts of the penalty<sup>8</sup>;
- (6) the manner in which, and place at which, the penalty is required to be paid to the Commission<sup>9</sup>;
- (7) the date or dates, no earlier than the end of the relevant period beginning with the date of service of the notice on the person concerned, by which the penalty or (as the case may be) different portions of it are required to be paid<sup>10</sup>;
- (8) that the penalty or (as the case may be) different portions of it may be paid earlier than the date or dates by which it or they are required to be paid<sup>11</sup>; and

(9) that the person concerned has the right to apply for a different payment date<sup>12</sup> or to appeal<sup>13</sup> and the main details of those rights<sup>14</sup>.

Such a notice is given by serving a copy of it on the person on whom the penalty was imposed and by publishing it<sup>15</sup>.

The person against whom the penalty was imposed may, within 14 days of the date of service on him of such a notice, apply to the Commission for it to specify a different date or (as the case may be) different dates by which the penalty or (as the case may be) different portions of it are to be paid<sup>16</sup>.

1      le a penalty under the Enterprise Act 2002 s 110(1) or s 110(3) (see PARA 260).

2      As to the Competition Commission see PARAS 9-12.

3      Enterprise Act 2002 s 112(1).

4      Enterprise Act 2002 s 112(2)(a).

5      Enterprise Act 2002 s 112(2)(b).

6      Enterprise Act 2002 s 112(2)(c).

7      Enterprise Act 2002 s 112(2)(d).

8      Enterprise Act 2002 s 112(2)(e).

9      Enterprise Act 2002 s 112(2)(f).

10     Enterprise Act 2002 s 112(2)(g). In s 112 'relevant period' means the period of 28 days mentioned in s 114(3) (see PARA 263) or, if another period is specified by the Secretary of State under that subsection, that period: s 112(5).

11     Enterprise Act 2002 s 112(2)(h).

12     le under the Enterprise Act 2002 s 112(3).

13     le under the Enterprise Act 2002 s 114 (see PARA 263).

14     Enterprise Act 2002 s 112(2)(i).

15     Enterprise Act 2002 s 112(4).

16     Enterprise Act 2002 s 112(3). Where an application has been made under s 112(3), the penalty is not required to be paid until the application has been determined, withdrawn or otherwise dealt with: s 113(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/262. Payments and interest by instalments.

## **262. Payments and interest by instalments.**

If the whole or any portion of a penalty<sup>1</sup> is not paid by the date by which it is required to be paid, the unpaid balance from time to time carries interest at the prescribed rate<sup>2</sup>. If a portion of a penalty has not been paid by the date required for it, the Competition Commission<sup>3</sup> may, where it considers it appropriate to do so, require so much of the penalty as has not already been paid (and is capable of being paid immediately) to be paid immediately<sup>4</sup>.

Sums received by the Commission in or towards the payment of a penalty, or interest on a penalty, are paid into the Consolidated Fund<sup>5</sup>.

- 1 As to penalties see PARAS 260-261.
- 2 Enterprise Act 2002 s 113(1). The prescribed rate is the rate for the time being specified in the Judgments Act 1838 s 17: Enterprise Act 2002 s 113(1). As to payments where an application has been made under s 112(3) see s 113(2); and PARA 261.
- 3 As to the Competition Commission see PARAS 9-12.
- 4 Enterprise Act 2002 s 113(3).
- 5 Enterprise Act 2002 s 113(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/263. Appeals in relation to penalties.

### **263. Appeals in relation to penalties.**

If a person on whom a penalty is imposed<sup>1</sup> is aggrieved by:

- (1) the imposition or nature of the penalty;
- (2) the amount or amounts of the penalty; or
- (3) the date by which the penalty is required to be paid or (as the case may be) the different dates by which portions of the penalty are required to be paid,

then the person aggrieved may apply to the Competition Appeal Tribunal<sup>2</sup>.

If a copy of the penalty notice<sup>3</sup> was served on the person on whom the penalty was imposed, the application to the Competition Appeal Tribunal must be made within the period of 28 days starting with the day on which the copy was served on the person concerned, or within such other period as the Secretary of State may by order specify<sup>4</sup>. If the application relates to a decision of the Competition Commission<sup>5</sup> on an application by the person on whom the penalty was imposed to alter the payment date<sup>6</sup>, the application to the Competition Appeal Tribunal must be made within the period of 28 days starting with the day on which the person concerned is notified of the decision, or within such other period as the Secretary of State may by order specify<sup>7</sup>.

The Competition Appeal Tribunal may, if it considers it appropriate to do so:

- (a) quash the penalty<sup>8</sup>;
- (b) substitute a penalty of a different nature or of such lesser amount or amounts as the Competition Appeal Tribunal considers appropriate<sup>9</sup>; or
- (c) in a case where an application has been made contesting the penalty payment date, substitute for the date or dates imposed by the Commission an alternative date or dates<sup>10</sup>;

Where an application has been made to the Competition Appeal Tribunal, the penalty is not required to be paid until the application has been determined, withdrawn or otherwise dealt with<sup>11</sup>. The Commission may agree to reduce the amount or amounts of the penalty in

settlement of the application<sup>12</sup>. Where the Competition Appeal Tribunal substitutes a penalty of a different nature or of a lesser amount or amounts it may require the payment of interest on the substituted penalty at such rate or rates, and from such date or dates, as it considers appropriate<sup>13</sup>. Where the Competition Appeal Tribunal specifies as a date by which the penalty, or a portion of the penalty, is to be paid a date before the determination of the application to the Competition Appeal Tribunal, it may require the payment of interest on the penalty, or portion, from that date at such rate as it considers appropriate<sup>14</sup>.

An appeal lies to the Court of Appeal on a point of law arising from a decision of the Tribunal or from a decision of the Tribunal as to the amount or amounts of a penalty<sup>15</sup>.

1       le under the Enterprise Act 2002 s 110(1) or s 110(3) (see PARA 260).

2       Enterprise Act 2002 s 114(1), (2). As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 656. As to the Competition Appeal Tribunal see PARAS 13-17.

3       le the notice under the Enterprise Act 2002 s 112(1) (see PARA 261).

4       Enterprise Act 2002 s 114(3). As to the Secretary of State see PARA 5.

5       As to the Competition Commission see PARAS 9-12.

6       le an application under the Enterprise Act 2002 s 112(3) (see PARA 261).

7       Enterprise Act 2002 s 114(4).

8       Enterprise Act 2002 s 114(5)(a).

9       Enterprise Act 2002 s 114(5)(b). The Competition Appeal Tribunal may not substitute a penalty of a different nature under s 114(5)(b) unless it considers that the person on whom the penalty is imposed will, or is likely to, pay less under the substituted penalty than he would have paid under the original penalty: s 114(6).

10       Enterprise Act 2002 s 114(5)(c).

11       Enterprise Act 2002 s 114(7)(a).

12       Enterprise Act 2002 s 114(7)(b).

13       Enterprise Act 2002 s 114(8).

14       Enterprise Act 2002 s 114(9).

15       Enterprise Act 2002 s 114(10), (12). An appeal to the Court of Appeal may be brought by a party to the proceedings before the Tribunal, and it requires the permission of the Tribunal or the Court of Appeal: s 114(11).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/264. Recovery of penalties.

## **264. Recovery of penalties.**

Where a penalty<sup>1</sup> or any portion of such a penalty has not been paid by the date on which it is required to be paid and:

- (1)       no application to the Competition Appeal Tribunal relating to the penalty has been made<sup>2</sup> during the period within which such an application may be made; or

(2) any such application which has been made has been determined, withdrawn or otherwise dealt with,

the Competition Commission<sup>3</sup> may recover from the person on whom the penalty was imposed any of the penalty and any interest which has not been paid<sup>4</sup>.

1       Ie a penalty imposed under the Enterprise Act 2002 s 110(1) or s 110(3) (see PARA 260).

2       Ie under the Enterprise Act 2002 s 114 (see PARA 263). As to the Competition Appeal Tribunal see PARAS 13-17.

3       As to the Competition Commission see PARAS 9-12.

4       Enterprise Act 2002 s 115. Such penalty and interest may be recovered as a civil debt due to the Commission: see s 115.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/265. Statement of policy.

## **265. Statement of policy.**

The Competition Commission<sup>1</sup> must prepare and publish a statement of policy in relation to the enforcement of notices<sup>2</sup> requiring the attendance of witnesses or the production of documents<sup>3</sup>. The statement must, in particular, include a statement about the considerations relevant to the determination of the nature and amount of any penalty imposed<sup>4</sup>.

The Commission may revise its statement of policy and, where it does so, it is under a duty to publish the revised statement<sup>5</sup>. The Commission must consult such persons as it considers appropriate when preparing or revising its statement of policy<sup>6</sup>.

1       As to the Competition Commission see PARAS 9-12.

2       Ie notices under the Enterprise Act 2002 s 109 (see PARA 259).

3       Enterprise Act 2002 s 116(1).

4       Enterprise Act 2002 s 116(2). This refers to penalties imposed under s 110(1) or s 110(3) (see PARA 260).

5       Enterprise Act 2002 s 116(3).

6       Enterprise Act 2002 s 116(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(viii) Investigation Powers/266. Offence of supplying false or misleading information.

## **266. Offence of supplying false or misleading information.**

A person commits an offence if:

- (1) he supplies any information to the Office of Fair Trading (the 'OFT')<sup>1</sup>, the Office of Communications ('OFCOM')<sup>2</sup>, the Competition Commission<sup>3</sup> or the Secretary of State<sup>4</sup> in connection with any of their functions under Part 3 of the Enterprise Act 2002<sup>5</sup>;
- (2) the information is false or misleading in a material respect<sup>6</sup>; and
- (3) he knows that it is false or misleading in a material respect or is reckless as to whether it is false or misleading in a material respect<sup>7</sup>.

A person commits an offence if he:

- (a) supplies any information to another person which he knows to be false or misleading in a material respect; or
- (b) recklessly supplies any information to another person which is false or misleading in a material respect;

knowing that the information is to be used for the purpose of supplying information to the OFT, OFCOM, the Commission or the Secretary of State in connection with any of their functions under Part 3 of the Enterprise Act 2002<sup>8</sup>.

1 As to the OFT see PARAS 6-8.

2 As to OFCOM see PARA 19.

3 As to the Competition Commission see PARAS 9-12.

4 As to the Secretary of State see PARA 5.

5 Enterprise Act 2002 s 117(1)(a) (amended by the Communications Act 2003 Sch 16 para 20(1), (2)). See note 8. As to the Enterprise Act 2002 Pt 3 (ss 22-130) see PARA 172 et seq.

6 Enterprise Act 2002 s 117(1)(b). See note 8.

7 Enterprise Act 2002 s 117(1)(c). See note 8.

8 Enterprise Act 2002 s 117(2) (amended by the Communications Act 2003 Sch 16 para 20(1), (3)). A person who commits an offence under the Enterprise Act 2002 s 117(1) or s 117(2) is liable on summary conviction, to a fine not exceeding the statutory maximum; and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 117(3). As to the statutory maximum see PARA 140 note 9.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ix) Media Mergers/267. General functions of OFCOM in relation to media mergers.

## **(ix) Media Mergers**

### **267. General functions of OFCOM in relation to media mergers.**

The Office of Communications ('OFCOM') has the function of obtaining, compiling and keeping under review information about matters relating to the carrying out of its functions under Part 3 of the Enterprise Act 2002<sup>1</sup>. That function is to be carried out with a view to (among other things) ensuring that OFCOM has sufficient information to take informed decisions and to carry



out its other functions effectively<sup>2</sup>. In carrying out that function OFCOM may carry out, commission or support (financially or otherwise) research<sup>3</sup>.

1 Enterprise Act 2002 s 119A(1) (s 119A added by the Communications Act 2003 s 385). As to the Enterprise Act 2002 Pt 3 (ss 22-130) see PARA 172 et seq. The Communications Act 2003 s 3 (general duties of OFCOM) does not apply in relation to functions of OFCOM under the Enterprise Act 2002 Pt 3: s 119A(4) (as so added).

2 Enterprise Act 2002 s 119A(2) (as added: see note 1).

3 Enterprise Act 2002 s 119A(3) (as added: see note 1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ix) Media Mergers/268. Monitoring role of the Office of Fair Trading.

## **268. Monitoring role of the Office of Fair Trading.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> has the function of obtaining, compiling and keeping under review information about matters which may be relevant to the Secretary of State<sup>2</sup> in deciding whether to give a special intervention notice<sup>3</sup> mentioning specified national security considerations<sup>4</sup>. That function is to be carried out with a view to (among other things) ensuring that the Secretary of State is aware of cases where, in the opinion of the OFT, he might wish to consider giving such a notice<sup>5</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Secretary of State see PARA 5.

3 As to the meaning of 'special intervention notice' see PARA 204.

4 Enterprise Act 2002 s 119B(1) (s 119B added by the Communications Act 2003 s 386). The text refers to the considerations mentioned in the Enterprise Act 2002 s 58(2A)-(2C) (see PARA 203). That function does not extend to obtaining, compiling or keeping under review information with a view to carrying out a detailed analysis in each case of the operation in relation to that case of the consideration specified in s 58(2A)-(2C): s 119B(3) (as so added).

5 Enterprise Act 2002 s 119B(2) (as added: see note 4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ix) Media Mergers/269. Public consultation in relation to media mergers.

## **269. Public consultation in relation to media mergers.**

Where the Competition Commission<sup>1</sup>:

- (1) is preparing (a) a report<sup>2</sup> on a reference which specifies a media public interest consideration; or (b) a report<sup>3</sup> on a reference which specifies certain national security considerations<sup>4</sup>; and

(2) is not under a duty to disregard the consideration concerned,

then it must have regard (among other things) to the need to consult the public so far as they might be affected by the creation of the relevant merger situation<sup>5</sup> or special merger situation<sup>6</sup> concerned and so far as such consultation is practicable<sup>7</sup>. Any such consultation may be undertaken by the Commission by consulting such representative sample of the public or section of the public concerned as the Commission considers appropriate<sup>8</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 I.e. under the Enterprise Act 2002 s 50 (see PARA 198).

3 I.e. under the Enterprise Act 2002 s 65 (see PARA 211).

4 I.e. a consideration specified in the Enterprise Act 2002 s 58(2A)-(2C) (see PARA 203).

5 As to the meaning of 'relevant merger situation' see PARA 173.

6 As to the meaning of 'special merger situation' see PARA 204.

7 Enterprise Act 2002 s 104A(1), (2) (s 104A added by the Communications Act 2003 s 381).

8 Enterprise Act 2002 s 104A(3) (as added: see note 7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(ix) Media Mergers/270. Advice and information in relation to media mergers.

## **270. Advice and information in relation to media mergers.**

The Secretary of State may prepare and publish general advice and information about certain national security considerations<sup>1</sup>. Such advice or information is to be prepared with a view to: (1) explaining the specified national security considerations to persons who are likely to be affected by them; and (2) indicating how the Secretary of State expects Part 3 of the Enterprise Act 2002<sup>2</sup> to operate in relation to such considerations<sup>3</sup>. Any such advice or information must be published in such manner as the Secretary of State considers appropriate<sup>4</sup>. In preparing it, the Secretary of State must consult the Office of Fair Trading (the 'OFT'), the Office of Communications (OFCOM), the Competition Commission and such other persons as he considers appropriate<sup>5</sup>. The Secretary of State may at any time publish revised, or new, advice or information<sup>6</sup>.

1 Enterprise Act 2002 s 106A(1) (s 106A added by the Communications Act 2003 s 383). The text refers to the considerations specified in the Enterprise Act 2002 s 58(2A)-(2C) (see PARA 203). As to the Secretary of State see PARA 5.

2 I.e. the Enterprise Act 2002 Pt 3 (ss 22-130): see PARA 172 et seq.

3 Enterprise Act 2002 s 106A(3) (as added: see note 1).

4 Enterprise Act 2002 s 106A(4) (as added: see note 1).

5 Enterprise Act 2002 s 106A(5) (as added: see note 1). As to the OFT see PARAS 6-8. As to OFCOM see PARA 19. As to the Competition Commission see PARAS 9-12.

6 Enterprise Act 2002 s 106A(2) (as added: see note 1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(x) Review of Decisions/271. Review of decisions under Part 3 of the Enterprise Act 2002.

## **(x) Review of Decisions**

### **271. Review of decisions under Part 3 of the Enterprise Act 2002.**

Any person aggrieved by a decision of the Office of Fair Trading (the 'OFT')<sup>1</sup>, the Office of Communications (OfCOM)<sup>2</sup>, the Secretary of State<sup>3</sup> or the Competition Commission<sup>4</sup> under Part 3 of the Enterprise Act 2002<sup>5</sup> in connection with a reference or possible reference in relation to a relevant merger situation<sup>6</sup> or a special merger situation<sup>7</sup> may apply to the Competition Appeal Tribunal for a review of that decision<sup>8</sup>. Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application<sup>9</sup>.

In determining such an application the Competition Appeal Tribunal must apply the same principles as would be applied by a court on an application for judicial review<sup>10</sup>. The Competition Appeal Tribunal may dismiss the application or quash the whole or part of the decision to which it relates<sup>11</sup>. Where it quashes the whole or part of that decision, it may refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal<sup>12</sup>.

An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal to the Court of Appeal<sup>13</sup>.

1 For this purpose 'decision' does not include a decision to impose a penalty under the Enterprise Act 2002 s 110(1) or s 110(3) (see PARA 260), but it includes a failure to take a decision permitted or required by Pt 3 (ss 22-130) in connection with a reference or possible reference: s 120(2). As to the OFT see PARAS 6-8. As to persons aggrieved see **JUDICIAL REVIEW** vol 61 (2010) PARA 656.

2 As to OfCOM see PARA 19.

3 As to the Secretary of State see PARA 5.

4 As to the Competition Commission see PARAS 9-12.

5 Ie the Enterprise Act 2002 Pt 3 (ss 22-130).

6 As to the meaning of 'relevant merger situation' see PARA 173.

7 As to the meaning of 'special merger situation' see PARA 204.

8 Enterprise Act 2002 s 120(1) (amended by the Communications Act 2003 Sch 16 para 22). As to the Competition Appeal Tribunal see PARAS 13-17.

9 Enterprise Act 2002 s 120(3).

10 Enterprise Act 2002 s 120(4). As to judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 601 et seq.

11 Enterprise Act 2002 s 120(5)(a).

12 Enterprise Act 2002 s 120(5)(b).

13 Enterprise Act 2002 s 120(6), (8). An appeal requires the permission of the Tribunal or the Court of Appeal: s 120(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(xi) Fees, Orders and Regulations/272. Fees.

## **(xi) Fees, Orders and Regulations**

### **272. Fees.**

The Secretary of State<sup>1</sup> may by order require the payment to him or the Office of Fair Trading (the 'OFT')<sup>2</sup> of such fees as may be prescribed by the order in connection with the exercise by the Secretary of State, the OFT, the Office of Communications (OFCOM)<sup>3</sup> and the Competition Commission<sup>4</sup> of certain statutory functions<sup>5</sup>. Such an order may, in particular, provide for fees to be payable in respect of a merger notice<sup>6</sup> or on the occurrence of any event specified in the order<sup>7</sup>. Such events may include:

- (1) the decision by the OFT in relation to a possible reference in relation to a completed or anticipated merger<sup>8</sup> that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>9</sup>;
- (2) the decision by the Secretary of State in relation to a possible reference in relation to a completed or anticipated merger<sup>10</sup> that it is or may be the case that a relevant merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation<sup>11</sup>;
- (3) the decision by the Secretary of State in relation to a possible reference<sup>12</sup> that: (a) it is or may be the case that a special merger situation has been created or (as the case may be) that arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a special merger situation; and (b) one or more than one consideration mentioned in the special intervention notice is relevant to a consideration of the special merger situation concerned<sup>13</sup>; and
- (4) the decision by the OFT in relation to a possible reference under the Water Industry Act 1991<sup>14</sup> that it is or may be the case that arrangements are in progress which, if carried into effect, will result in a merger of any two or more water enterprises or that such a merger has taken place otherwise than as a result of the carrying into effect of certain specified arrangements<sup>15</sup>.

An order may, in particular, contain provision (i) for ascertaining the persons by whom fees are payable; (ii) specifying whether any fee is payable to the Secretary of State or the OFT; (iii) for the amount of any fee to be calculated by reference to matters which may include the value of the turnover of the enterprises concerned; (iv) as to the time when any fee is to be paid; and (v) for the repayment by the Secretary of State or the OFT of the whole or part of any fee in specified circumstances<sup>16</sup>.

In determining the amount of any fees to be prescribed by an order, the Secretary of State may take into account all costs incurred by him and by the OFT in respect of the exercise by him, the OFT, OFCOM and the Commission of their respective functions<sup>17</sup>.

Fees paid to the Secretary of State or the OFT are paid into the Consolidated Fund<sup>18</sup>.

1 As to the Secretary of State see PARA 5.

2 As to the OFT see PARAS 6-8.

3 As to OFCOM see PARA 19.

4 As to the Competition Commission see PARAS 9-12.

5 le their functions under or by virtue of the Enterprise Act 2002 Pt 3 (ss 22-130) and the Water Industry Act 1991 ss 32-34, Sch 4ZA: see the Enterprise Act 2002 s 121(1) (amended by the Communications Act 2003 Sch 16 para 23(1), (2)). In exercise of his power under the Enterprise Act 2002 s 121 the Secretary of State has made the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370 (amended by SI 2004/3204; SI 2005/3558).

6 As to the meaning of 'merger notice' see PARA 247. As to the fee payable in respect of the giving of a merger notice see the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370, arts 3, 4, 5.

7 Enterprise Act 2002 s 121(2) (amended by the Communications Act 2003 Sch 16 para 23(1), (3)).

8 le a reference by the OFT under the Enterprise Act 2002 s 22 (see PARA 172) or s 33 (see PARA 182).

9 Enterprise Act 2002 s 121(3)(a). As to the meaning of 'relevant merger situation' see PARA 173. As to the fee payable in this situation see the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370, arts 3, 4, 5.

10 le a reference by the Secretary of State under the Enterprise Act 2002 s 45 (see PARA 193).

11 Enterprise Act 2002 s 121(3)(b). As to the fee payable in this situation see the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370, arts 3, 4, 5.

12 le a reference by the Secretary of State under the Enterprise Act 2002 s 62 (see PARA 208).

13 Enterprise Act 2002 s 121(3)(c). As to the meaning of 'special merger situation' see PARA 204.

14 le a reference under the Water Industry Act 1991 s 32 (see **WATER AND WATERWAYS** vol 100 (2009) PARAS 150-151).

15 Enterprise Act 2002 s 121(3)(d). The text refers to arrangements that have been the subject of a reference by virtue of the Water Industry Act 1991 s 32(a) (see **WATER AND WATERWAYS** vol 100 (2009) PARA 150). See the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370, arts 3, 5.

16 Enterprise Act 2002 s 121(4)(a)-(e) (s 121(4) amended by the Communications Act 2003 Sch 16 para 23(1), (4)). See the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370, arts 6-10. The turnover of an enterprise is to be determined in accordance with such provisions as may be specified in an order made under the Enterprise Act 2002 s 121: s 121(5). This may include provision: (1) as to the amounts which are, or which are not, to be treated as comprising an enterprise's turnover; (2) as to the date or dates by reference to which an enterprise's turnover is to be determined; (3) restricting the turnover to be taken into consideration to turnover which has a connection of a particular description with the United Kingdom: s 121(6). An order may, in particular, in connection with provisions of the kind mentioned in s 121(5) make provision enabling the Secretary of State or the OFT to determine matters of a description specified in the order (including any of the matters mentioned in s 121(6) (see heads (1)-(3))): s 121(7). See the Enterprise Act 2002 (Merger Fees and Determination of Turnover) Order 2003, SI 2003/1370, art 11.

17 Enterprise Act 2002 s 121(8) (amended by the Communications Act 2003 Sch 16 para 23(1), (5)). The functions referred to in the text are those under or by virtue of the Enterprise Act 2002 Pt 3 and the Water Industry Act 1991 ss 32-34, Sch 4ZA (see note 5).

18 Enterprise Act 2002 s 121(9).

## UPDATE

### 272 Fees

NOTE 5--SI 2003/1370 further amended: SI 2009/2396.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(xi) Fees, Orders and Regulations/273. Orders and regulations in relation to mergers.

### **273. Orders and regulations in relation to mergers.**

Any power of the Secretary of State<sup>1</sup> to make an order or regulations under Part 3 of the Enterprise Act 2002<sup>2</sup> is exercisable by statutory instrument<sup>3</sup>. The power may be exercised so as to make different provision for different cases or different purposes and includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate<sup>4</sup>. The Secretary of State may also modify enactments<sup>5</sup>.

- 1 As to the Secretary of State see PARA 5.
- 2 Ie under the Enterprise Act 2002 Pt 3 (ss 22-130).
- 3 Enterprise Act 2002 s 124(1). For drafting provisions see s 124(5)-(10).
- 4 Enterprise Act 2002 s 124(2).
- 5 See the Enterprise Act 2002 s 124(3), (4) (amended by the Communications Act 2003 Sch 16 para 24).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(xii) Offences by Bodies Corporate/274. Offences by bodies corporate.

### **(xii) Offences by Bodies Corporate**

#### **274. Offences by bodies corporate.**

Where an offence under Part 3 of the Enterprise Act 2002<sup>1</sup> committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of (1) a director, manager, secretary or other similar officer of the body corporate; or (2) a person purporting to act in such a capacity, he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly<sup>2</sup>.

- 1 Ie the Enterprise Act 2002 Pt 3 (ss 22-130).
- 2 Enterprise Act 2002 s 125(1). Where the affairs of a body corporate are managed by its members, s 125(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 125(2). See further **CORPORATIONS**. As to offences by Scottish partnerships see s 125(3), (4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(2) MERGERS/(xiii) Service of Documents/275. Service of documents.

### (xiii) Service of Documents

#### 275. Service of documents.

Any document required or authorised by virtue of Part 3 of the Enterprise Act 2002<sup>1</sup> to be served on any person may be served:

- (1) by delivering it to him or by leaving it at his proper address or by sending it by post to him at that address<sup>2</sup>;
- (2) if the person is a body corporate other than a limited liability partnership, by serving it in accordance with head (1) on the secretary of the body<sup>3</sup>;
- (3) if the person is a limited liability partnership, by serving it in accordance with head (1) on a member of the partnership<sup>4</sup>; or
- (4) if the person is a partnership, by serving it in accordance with head (1) on a partner or a person having the control or management of the partnership business<sup>5</sup>.

For these purposes<sup>6</sup>, the proper address of any person on whom a document is to be served is his last known address, except that (a) in the case of service on a body corporate (other than a limited liability partnership) or its secretary, it is the address of the registered or principal office of the body<sup>7</sup>; (b) in the case of service on a limited liability partnership or a member of the partnership, it is the address of the registered or principal office of the partnership<sup>8</sup>; (c) in the case of service on a partnership or a partner or a person having the control or management of a partnership business, it is the address of the principal office of the partnership<sup>9</sup>. If a person to be served under Part 3 of the Act with any document by another has specified to that other an address within the United Kingdom other than his proper address<sup>10</sup> as the one at which he or someone on his behalf will accept documents of the same description as that document, then in relation to that document, that address is to be treated as his proper address<sup>11</sup>.

Any notice in writing or other document required or authorised by virtue of Part 3 of the Act to be served on any person may be served on that person by transmitting the text of the notice or other document to him by means of an electronic communications network or by other means but while in electronic form provided the text is received by that person in legible form and is capable of being used for subsequent reference<sup>12</sup>.

The provisions described above do not apply to any document if rules of court make provision about its service<sup>13</sup>.

1     Ie the Enterprise Act 2002 Pt 3 (ss 22-130).

2     Enterprise Act 2002 s 126(1)(a).

3     Enterprise Act 2002 s 126(1)(b). References to serving include references to similar expressions (such as giving or sending): see s 126(8).

As to bodies corporate see **COMPANIES; CORPORATIONS**. As to limited liability partnerships see **PARTNERSHIP** vol 79 (2008) PARA 234 et seq.

4     Enterprise Act 2002 s 126(1)(c).

5     Enterprise Act 2002 s 126(1)(d). As to partnerships see generally **PARTNERSHIP**.

6     Ie for the purposes of the Enterprise Act 2002 s 126 and the Interpretation Act 1978 s 7 in its application to the Enterprise Act 2002 s 126.

7 Enterprise Act 2002 s 126(2)(a). The principal office of a company constituted under the law of a country or territory outside the United Kingdom or of a partnership carrying on business outside the United Kingdom is its principal office within the United Kingdom: s 126(3). As to the meaning of 'United Kingdom' see PARA 401 note 1.

8 Enterprise Act 2002 s 126(2)(b).

9 Enterprise Act 2002 s 126(2)(c).

10 le as determined under the Enterprise Act 2002 s 126(2) (see heads (a)-(c) in the text).

11 Enterprise Act 2002 s 126(4), (5). This address is then treated as his proper address for the purposes of s 126 and the Interpretation Act 1978 s 7 in its application to the Enterprise Act 2002 s 126, instead of that determined under s 126(2): s 126(5).

12 Enterprise Act 2002 s 126(6) (amended by the Communications Act 2003 Sch 17 para 174(1), (2)).

13 Enterprise Act 2002 s 126(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(i) Market Investigation References/A. MAKING OF REFERENCES/276. Power of the Office of Fair Trading to make a market investigation reference.

### **(3) MARKET INVESTIGATIONS**

#### **(i) Market Investigation References**

##### **A. MAKING OF REFERENCES**

##### **276. Power of the Office of Fair Trading to make a market investigation reference.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may make a reference to the Competition Commission<sup>2</sup> if the OFT has reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom<sup>3</sup>. For these purposes, any reference to a feature of a market in the United Kingdom for goods or services is a reference to: (1) the structure of the market concerned or any aspect of that structure<sup>4</sup>; (2) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned<sup>5</sup>; or (3) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services<sup>6</sup>.

No market investigation reference may be made by the OFT if a market investigation reference has been made by the appropriate Minister in relation to the same matter but has not been finally determined<sup>7</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Competition Commission see PARAS 9-12.

3 Enterprise Act 2002 s 131(1). As to the duty to consult see PARA 309. As to the requirement to publish information see PARA 311. A reference under s 131 or s 132 (see PARA 277) is referred to as a 'market investigation reference': s 131(6). 'Market in the United Kingdom' includes (1) so far as it operates in the United Kingdom or a part of the United Kingdom, any market which operates there and in another country or territory or in a part of another country or territory; and (2) any market which operates only in a part of the United



Kingdom: s 131(6). References to a 'market for goods or services' include references to a market for goods and services: s 131(6). 'Goods' includes buildings and other structures, and also includes ships, aircraft and hovercraft: s 183(1). 'Supply', in relation to the supply of goods, includes supply by way of sale, lease, hire or hire-purchase, and, in relation to buildings or other structures, includes the construction of them by a person for another person: s 183(1). As to the meaning of 'United Kingdom' see PARA 401 note 1.

4 Enterprise Act 2002 s 131(2)(a).

5 Enterprise Act 2002 s 131(2)(b). 'Conduct' includes any failure to act (whether or not intentional) and any other unintentional conduct: s 131(3).

6 Enterprise Act 2002 s 131(2)(c).

7 Enterprise Act 2002 s 131(4)(b). As to market investigation references by the Secretary of State see s 132; and PARA 277. References in Pt 4 (ss 131-184) to a market investigation reference being finally determined are construed in accordance with s 183(3)-(6): s 131(5). No reference may be made under s 131 if the making of the reference is prevented by s 156(1) (see PARA 298): s 131(4)(a).

For the purposes of Part 4, a market investigation reference is finally determined if (see s 183(3)):

(1) where no intervention notice under s 139(1) (see PARA 283) has been given in relation to it: (a) the period permitted by s 137 for preparing and publishing a report under s 136 (see PARA 281) has expired and no such report has been prepared and published; (b) such a report has been prepared and published within the period permitted by s 137 and contains the decision that there is no adverse effect on competition; (c) the Commission has decided under s 138(2) (see PARA 282) neither to accept undertakings under s 159 (see PARA 301) nor to make an order under s 161 (see PARA 303); or (d) the Commission has accepted an undertaking under s 159 or made an order under s 161;

(2) where an intervention notice under s 139(1) (see PARA 283) has been given in relation to it: (a) the period permitted by s 144 (see PARA 288) for the preparation of the report of the Commission under s 142 (see PARA 286) and for action to be taken in relation to it under s 143(1), (3) (see PARA 287) has expired while the intervention notice is still in force and no such report has been so prepared or no such action has been taken; (b) the Commission has terminated under s 145(1) its investigation (see PARA 289) and the reference is finally determined under head (1) above (disregarding the fact that the notice was given); (c) the report of the Commission has been prepared under s 142 (see PARA 286) and published under s 143(1) (see PARA 287) within the period permitted by s 144 (see PARA 288); (d) the intervention notice was revoked and the reference is finally determined under head (1) above (disregarding the fact that the notice was given); (e) the Secretary of State has failed to make and publish a decision under s 146(2) within the period permitted by s 146(3) (see PARA 290) and the reference is finally determined under head (1) above (disregarding the fact that the notice was given); (f) the Secretary of State has decided under s 146(2) (see PARA 290) that no eligible public interest consideration is relevant and the reference is finally determined under head (1) above (disregarding the fact that the notice was given); (g) the Secretary of State has decided under s 146(2) that a public interest consideration is relevant but has decided under s 147(2) (see PARA 291) neither to accept an undertaking under s 159 (see PARA 301) nor to make an order under s 161 (see PARA 303); or (h) the Secretary of State has decided under s 146(2) (see PARA 290) that a public interest consideration is relevant and has accepted an undertaking under s 159 (see PARA 301) or made an order under s 161 (see PARA 303).

For the purposes of Pt 4 the time when a market investigation reference is finally determined is: (i) in a case falling within head (1)(a) or head (2)(a) above, the expiry of the time concerned; (ii) in a case falling within head (1)(b) or head (2)(c), the publication of the report; (iii) in a case falling within head (1)(d) or head (2)(h), the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned; and (iv) in any other case, the making of the decision or last decision concerned or the taking of the action concerned: s 183(4). The references in s 183(4) to heads (1)(a), (b) and (d) include those enactments as applied by head (2) (b), (d), (e) or (f): s 183(5). In head (iii) the reference to the acceptance of the undertaking concerned or the making of the order concerned, in a case where the enforcement action concerned involves the acceptance of a group of undertakings, the making of a group of orders or the acceptance and making of a group of undertakings and orders, is to be treated as a reference to the acceptance or making of the last undertaking or order in the group; but undertakings or orders which vary, supersede or revoke earlier undertakings or orders are to be disregarded for the purposes of heads (1)(d) and (2)(h) and (iii): s 183(6). 'Action' includes omission; and references to the taking of action include references to refraining from action: s 183(1).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(i) Market Investigation References/A. MAKING OF REFERENCES/277. Ministerial power to make market investigation references.

## **277. Ministerial power to make market investigation references.**

The appropriate Minister<sup>1</sup> may make a market investigation reference to the Competition Commission<sup>2</sup> if he has reasonable grounds for suspecting that any feature<sup>3</sup>, or combination of features, of a market in the United Kingdom for goods or services<sup>4</sup> prevents, restricts or distorts competition in connection with the supply<sup>5</sup> or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom<sup>6</sup>. Such a reference may be made where, in relation to any goods or services, the appropriate Minister is not satisfied with a decision of the Office of Fair Trading (the 'OFT') not to make a reference under its power to do so<sup>7</sup>. The appropriate Minister may also make such a reference where, in relation to any goods or services, he has brought information to the attention of the OFT which he considers to be relevant to the question of whether the OFT should make a reference, but he is not satisfied that the OFT will decide, within such period as the appropriate Minister considers to be reasonable, whether to make such a reference<sup>8</sup>.

1 'Appropriate Minister' means (1) the Secretary of State; or (2) the Secretary of State and one or more than one other Minister of the Crown acting jointly: Enterprise Act 2002 s 132(5). As to the Secretary of State see PARA 5. 'Minister of the Crown' means the holder of an office in Her Majesty's Government in the United Kingdom and includes the Treasury: s 183(1).

2 As to the Competition Commission see PARAS 9-12. As to the meaning of 'market investigation reference' see PARA 276 note 3.

3 As to the meaning of 'feature of a market' see PARA 276.

4 As to the meanings of 'market for goods or services', 'market in the United Kingdom' and 'goods' see PARA 276 note 3. As to the meaning of 'United Kingdom' see PARA 401 note 1.

5 As to the meaning of 'supply' see PARA 276 note 3.

6 Enterprise Act 2002 s 132(3). As to the duty to consult see PARA 309. As to the requirement to publish information see PARA 311. No reference may be made under s 132 if the making of the reference is prevented by s 156(1) (see PARA 298): s 132(4).

7 Enterprise Act 2002 s 132(1). As to the OFT see PARAS 6-8. As to the power of the OFT to make market investigation reference see s 131; and PARA 276.

8 Enterprise Act 2002 s 132(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(i) Market Investigation References/A. MAKING OF REFERENCES/278. Contents of references.

## **278. Contents of references.**

A market investigation reference<sup>1</sup> must, in particular, specify (1) the enactment<sup>2</sup> under which it is made<sup>3</sup>; (2) the date on which it is made<sup>4</sup>; and (3) the description of goods or services to which the feature or combination of features concerned relates<sup>5</sup>. A market investigation reference may be framed so as to require the Competition Commission<sup>6</sup> to confine its investigation into the effects of features of markets in the United Kingdom for goods or services<sup>7</sup> of a description

specified in the reference to the effects of features of such of those markets as exist in connection with: (a) a supply, of a description specified in the reference, of the goods or services concerned; or (b) an acquisition, of a description specified in the reference, of the goods or services concerned<sup>8</sup>.

1 As to the meaning of 'market investigation reference' see PARA 276 note 3.

2 'Enactment' includes an Act of the Scottish Parliament, Northern Ireland legislation and an enactment comprised in subordinate legislation, and includes an enactment whenever passed or made: Enterprise Act 2002 s 183(1).

3 Enterprise Act 2002 s 133(1)(a).

4 Enterprise Act 2002 s 133(1)(b).

5 Enterprise Act 2002 s 133(1)(c). As to the meaning of 'feature of a market' see PARA 276. As to the meaning of 'goods' see PARA 276 note 3.

6 As to the Competition Commission see PARAS 9-12.

7 As to the meanings of 'market for goods or services' and 'market in the United Kingdom' see PARA 276 note 3. As to the meaning of 'United Kingdom' see PARA 401 note 1.

8 Enterprise Act 2002 s 133(2)(a), (b). A description of the kind mentioned in s 133(2)(a) or s 133(2)(b) may, in particular, be by reference to: (1) the place where the goods or services are supplied or acquired; or (2) the persons by or to whom they are supplied or by or from whom they are acquired: s 133(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(i) Market Investigation References/B. DETERMINATION OF REFERENCES/279. Questions to be decided.

## ***B. DETERMINATION OF REFERENCES***

### **279. Questions to be decided.**

On a market investigation reference<sup>1</sup>, the Competition Commission<sup>2</sup> must decide whether any feature, or combination of features<sup>3</sup>, of each relevant market<sup>4</sup> prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom<sup>5</sup>.

In relation to a market investigation reference, there is an adverse effect on competition if any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply or acquisition of any goods or services in the United Kingdom or a part of the United Kingdom<sup>6</sup>. If the Commission decides on a market investigation reference that there is an adverse effect on competition, then it must decide the following additional questions:

- (1) whether action should be taken by it<sup>7</sup> for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers<sup>8</sup> so far as it has resulted from, or may be expected to result from, the adverse effect on competition<sup>9</sup>;
- (2) whether it should recommend the taking of action by others for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition<sup>10</sup>; and

(3) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented<sup>11</sup>.

In deciding these questions, the Commission must, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition and any detrimental effects on customers so far as resulting from the adverse effect on competition<sup>12</sup>. It may also have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned<sup>13</sup>.

1 As to the meaning of 'market investigation reference' see PARA 276 note 3.

2 As to the Competition Commission see PARAS 9-12.

3 As to the meaning of 'feature of a market' see PARA 276.

4 In the Enterprise Act 2002 s 134(1), (2), 'relevant market' means:

(1) in the case of s 134(2) so far as it applies in connection with a possible reference, a market in the United Kingdom: (a) for goods or services of a description to be specified in the reference; and (b) which would not be excluded from investigation by virtue of s 133(2) (see s 134(3)(a)); and

(2) in any other case, a market in the United Kingdom: (a) for goods or services of a description specified in the reference concerned; and (b) which is not excluded from investigation by virtue of s 133(2) (see s 134(3)(b)).

As to the meanings of 'market in the United Kingdom' and 'goods' see PARA 276 note 3. As to the meaning of 'United Kingdom' see PARA 401 note 1.

5 Enterprise Act 2002 s 134(1). As to the duty to consult see PARA 309.

6 Enterprise Act 2002 s 134(2).

7 Ie under the Enterprise Act 2002 s 138 (see PARA 282).

8 For the purposes of the Enterprise Act 2002 Pt 4 (ss 131-184) in relation to a market investigation reference, there is a detrimental effect on customers if there is a detrimental effect on customers or future customers in the form of: (1) higher prices, lower quality or less choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or (2) less innovation in relation to such goods or services: s 134(5).

9 Enterprise Act 2002 s 134(4)(a).

10 Enterprise Act 2002 s 134(4)(b).

11 Enterprise Act 2002 s 134(4)(c).

12 Enterprise Act 2002 s 134(6).

13 Enterprise Act 2002 s 134(7). For the purposes of Pt 4 a benefit is a relevant customer benefit of a feature or features of a market if:

(1) it is a benefit to customers or future customers in the form of: (a) lower prices, higher quality or greater choice of goods or services in any market in the United Kingdom (whether or not the market to which the feature or features concerned relate); or (b) greater innovation in relation to such goods or services (s 134(8)(a)); and

(2) the Commission, the Secretary of State or (as the case may be) the Office of Fair Trading believes that: (a) the benefit has accrued as a result (whether wholly or partly) of the feature or features concerned or may be expected to accrue within a reasonable period as a result (whether wholly or partly) of that feature or those features; and (b) the benefit was, or is, unlikely to accrue without the feature or features concerned (s 134(8)(b)).

As to the Secretary of State see PARA 5. As to the OFT see PARAS 6-8.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(i) Market Investigation References/B. DETERMINATION OF REFERENCES/280. Variation of references.

## **280. Variation of references.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> or (as the case may be) the appropriate Minister<sup>2</sup> may at any time vary a market investigation reference<sup>3</sup> made by it or (as the case may be) him<sup>4</sup>, having previously consulted the Competition Commission<sup>5</sup> before doing so<sup>6</sup>.

Although market investigation references may be varied, no variation is capable of altering the period permitted within which certain reports of the Commission are to be prepared and published<sup>7</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the meaning of 'appropriate Minister' see PARA 277 note 1.

3 As to the meaning of 'market investigation reference' see PARA 276 note 3.

4 Enterprise Act 2002 s 135(1).

5 As to the Competition Commission see PARAS 9-12.

6 Enterprise Act 2002 s 135(2). There is no requirement to consult the Commission if it is the Commission which has requested the variation concerned: s 135(3). As to the duty to consult see PARA 309. As to the requirement to publish information see PARA 311.

7 No variation under the Enterprise Act 2002 s 135 is capable of altering the period permitted by s 137 within which the report of the Commission under s 136 (see PARA 281) is to be prepared and published or (as the case may be) the period permitted by s 144 within which the report of the Commission under s 142 (see PARA 286) is to be prepared and published or given: s 135(4). Any duty to publish which is imposed on a person by Pt 4 (ss 131-184), unless the context otherwise requires, is to be construed as a duty on that person to publish in such manner as that person considers appropriate for the purpose of bringing the matter concerned to the attention of those likely to be affected by it: s 183(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(i) Market Investigation References/B. DETERMINATION OF REFERENCES/281. Investigations and reports.

## **281. Investigations and reports.**

The Competition Commission<sup>1</sup> must prepare and publish a report on a market investigation reference<sup>2</sup> within the period of two years beginning with the date of the reference<sup>3</sup>. That period may be altered, subject to restrictions<sup>4</sup>.

The Commission is under a duty to carry out such investigations as it considers appropriate for the purposes of preparing the report<sup>5</sup>. The report itself must, in particular, contain:

- (1) the decisions of the Commission on the questions which it is required to answer<sup>6</sup>;

- (2) its reasons for its decisions<sup>7</sup>; and
- (3) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions<sup>8</sup>.

Where the market investigation reference was made by the Office of Fair Trading (the 'OFT')<sup>9</sup>, the Commission must give the report to the OFT at the same time as publishing it<sup>10</sup>. Where the market investigation reference was made by the appropriate Minister, the Commission must give it to the appropriate Minister with a copy to the OFT<sup>11</sup>. Where a market investigation reference has been made by the OFT or the appropriate Minister<sup>12</sup> in circumstances in which a reference could have been made by a relevant sectoral regulator<sup>13</sup>, the Commission must, at the same time as the report is published, give a copy of it to the relevant sectoral regulator concerned<sup>14</sup>. Where a reference has been made by a relevant sectoral regulator<sup>15</sup> the Commission must, at the same time as the report is published, give a copy of it to the OFT<sup>16</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 As to the meaning of 'market investigation reference' see PARA 276 note 3.

3 Enterprise Act 2002 ss 136(1), 137(1). This period is extended by 20 days where the Secretary of State revokes an intervention notice which has been given under s 139(1) or where the Commission terminates its investigation under s 145(1): see ss 137(2), 151; and PARAS 284, 289. References in Pt 4 (ss 131-184) to the date of a market investigation reference are to be construed as references to the date specified in the reference as the date on which it is made: s 137(7).

4 The Secretary of State may by order amend the Enterprise Act 2002 s 137(1) so as to alter the period of two years mentioned in that subsection or any period for the time being mentioned in that subsection in substitution for that period: s 137(3). However, no alteration may be made which results in the period for the time being mentioned in s 137(1) exceeding two years: s 137(4). Such an order does not affect any period of time within which the Commission is under a duty to prepare and publish its report under s 136 in relation to a market investigation reference if the Commission is already under that duty in relation to that reference when the order is made: s 137(5). Before making an order to alter the time period the Secretary of State must consult the Commission and such other persons as he considers appropriate: s 137(6). As to the Secretary of State see PARA 5.

5 Enterprise Act 2002 s 136(3).

6 Enterprise Act 2002 s 136(2)(a). As to the questions it is required to answer see s 134; and PARA 279.

7 Enterprise Act 2002 s 136(2)(b).

8 Enterprise Act 2002 s 136(2)(c).

9 As to the OFT see PARAS 6-8.

10 Enterprise Act 2002 s 136(4)(a).

11 Enterprise Act 2002 s 136(4)(b). As to the meaning of 'appropriate Minister' see PARA 277 note 1.

12 Ie by the OFT under the Enterprise Act 2002 s 131 (see PARA 276) or by the appropriate Minister under s 132 (see PARA 277).

13 Ie under the Enterprise Act 2002 s 131 as it has effect by virtue of a relevant sectoral enactment: s 136(5). 'Relevant sectoral regulator' means the Gas and Electricity Markets Authority, the Water Services Regulation Authority, the Office of Rail Regulation, the Civil Aviation Authority, the Office of Communications, or the Northern Ireland Authority for Utility Regulation: s 136(8) (amended by Communications Act 2003 s 406(7), Sch 17 para 174(1), (4), Sch 19(1); the Water Act 2003 s 101(1), Sch 7 Pt 2 para 36(1), (2); the Railways and Transport Safety Act 2003 s 16(5), Sch 2 Pt 2 para 19(u); and SI 2006/3336). 'Relevant sectoral enactment' means: (1) in relation to the Gas and Electricity Markets Authority, the Gas Act 1986 s 36A or (as the case may be) the Electricity Act 1989 s 43; (2) in relation to the Water Services Regulation Authority, the Water Industry Act 1991 s 31; (3) in relation to the Office of Rail Regulation, the Railways Act 1993 s 67; (4) in relation to the Civil Aviation Authority, the Transport Act 2000 s 86; (5) in relation to the Office of Communications, the Communications Act 2003 ss 370, 371; (6) in relation to the Northern Ireland Authority for Utility Regulation, the Electricity (Northern Ireland) Order 1992, SI 1992/231, art 46, the Gas (Northern Ireland) Order 1996, SI

1996/276, art 23, or the Water and Sewerage Services (Northern Ireland) Order 2006, SI 2006/1946, art 29; Enterprise Act 2002 s 136(7) (amended by the Communications Act 2003 s 406(1), (7), Sch 17 para 174(1), (4), Sch 19(1); the Water Act 2003 s 101(1), Sch 7 Pt 2 para 36(1), (2); Railways and Transport Safety Act 2003 s 16(5), Sch 2 Pt 2 para 19(u); and SI 2006/3336). The Secretary of State may by order modify the Enterprise Act 2002 s 136(7) or s 136(8): s 136(9).

14 Enterprise Act 2002 s 136(5).

15 Ie under the Enterprise Act 2002 s 131 as it has effect by virtue of a relevant sectoral enactment: s 136(6).

16 Enterprise Act 2002 s 136(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(i) Market Investigation References/B. DETERMINATION OF REFERENCES/282. Duty to remedy adverse effects.

## **282. Duty to remedy adverse effects.**

Where a report of the Competition Commission<sup>1</sup> has been prepared and published within the permitted time period<sup>2</sup> and contains the decision that there is one or more than one adverse effect on competition<sup>3</sup>, then in relation to each adverse effect it must take such permitted action<sup>4</sup> as it considers to be reasonable and practicable to:

- (1) remedy, mitigate or prevent the adverse effect on competition concerned<sup>5</sup>; and
- (2) remedy, mitigate or prevent any detrimental effects on customers<sup>6</sup> so far as they have resulted from, or may be expected to result from, the adverse effect on competition<sup>7</sup>.

The decisions to take such action must be consistent with its decisions as included in its report<sup>8</sup> unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has a special reason for deciding differently<sup>9</sup>. In making the decision to take appropriate action, the Commission must, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition<sup>10</sup>. The Commission may also have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned<sup>11</sup>. The Commission must take no action to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if: (a) no detrimental effect on customers has resulted from the adverse effect on competition; and (b) the adverse effect on competition is not being remedied, mitigated or prevented<sup>12</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 Ie where the report has been prepared under the Enterprise Act 2002 s 136 within the period permitted by s 137 (see PARA 281). As to the requirement to publish information see PARA 311.

3 Enterprise Act 2002 s 138(1). As to the meaning of 'adverse effect on competition' see PARA 279.

4 Ie such action under the Enterprise Act 2002 s 159 (see PARA 301) or s 161 (see PARA 303).

5 Enterprise Act 2002 s 138(2)(a).

- 6 As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.
- 7 Enterprise Act 2002 s 138(2)(b).
- 8 le the decisions included in the report by virtue of the Enterprise Act 2002 s 134(4) (see PARA 279).
- 9 Enterprise Act 2002 s 138(3). As to the requirement to publish information see PARA 311.
- 10 Enterprise Act 2002 s 138(4).
- 11 Enterprise Act 2002 s 138(5). As to the meaning of 'feature of a market' see PARA 276. As to the meaning of 'relevant customer benefit' see PARA 279 note 13.
- 12 Enterprise Act 2002 s 138(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/A. INTERVENTION NOTICES/283. Public interest intervention by the Secretary of State.

## **(ii) Public Interest Cases**

### **A. INTERVENTION NOTICES**

#### **283. Public interest intervention by the Secretary of State.**

The Secretary of State<sup>1</sup> may give an intervention notice<sup>2</sup> to the Competition Commission<sup>3</sup> or the Office of Fair Trading (the 'OFT')<sup>4</sup> in the following circumstances<sup>5</sup>.

He may give an intervention notice to the Commission<sup>6</sup> if:

- (1) a market investigation reference<sup>7</sup> has been made to the Competition Commission<sup>8</sup>;
- (2) no more than four months has passed since the date of the reference<sup>9</sup>;
- (3) the reference is not finally determined<sup>10</sup>; and
- (4) the Secretary of State believes that it is or may be the case that one or more than one public interest consideration is relevant to the case<sup>11</sup>.

The Secretary of State may give an intervention notice to the Office of Fair Trading<sup>12</sup> if:

- (a) the OFT is considering whether to accept an undertaking<sup>13</sup> instead of making a market investigation reference<sup>14</sup>, or is considering whether to accept an undertaking varying or superseding any such undertaking<sup>15</sup>;
- (b) the OFT has published a notice<sup>16</sup>; and
- (c) the Secretary of State believes that it is or may be the case that one or more than one public interest consideration is relevant to the case<sup>17</sup>.

Where the Secretary of State has given an intervention notice mentioning a public interest consideration which, at that time, is not finalised, he must, as soon as practicable, take such action as is within his power to ensure that it is finalised<sup>18</sup>.

1 As to the Secretary of State see PARA 5.



2 'Intervention notice' means a notice under the Enterprise Act 2002 s 139(1) or s 139(2): s 139(3).

3 As to the Competition Commission see PARAS 9-12.

4 As to the OFT see PARAS 6-8.

5 As to intervention notices given to the Competition Commission see PARAS 284-292. As to intervention notices given to the OFT see PARA 293.

6 No more than one intervention notice may be given under the Enterprise Act 2002 s 139(1) in relation to the same market investigation reference: s 139(4). Where an intervention notice under s 139(1) comes into force in relation to a market investigation reference, s 134(1), (4), (6), (7) (see PARA 279), ss 136(1)-(6), 137(1)-(6) (see PARA 281) and s 138 (see PARA 282) cease to apply in relation to that reference: s 151(1)

7 As to the meaning of 'market investigation reference' see PARA 276 note 3.

8 Enterprise Act 2002 s 139(1)(a).

9 Enterprise Act 2002 s 139(1)(b).

10 Enterprise Act 2002 s 139(1)(c).

11 Enterprise Act 2002 s 139(1)(d). A 'public interest consideration' is a consideration which, at the time of the giving of the intervention notice concerned, is specified in s 153 (see PARA 295) or is not so specified but, in the opinion of the Secretary of State, ought to be so specified: s 139(5). See note 6.

12 No more than one intervention notice may be given under the Enterprise Act 2002 s 139(2) in relation to the same proposed undertaking or in relation to proposed undertakings which do not differ from each other in any material respect: s 139(4).

13 ie an undertaking under the Enterprise Act 2002 s 154 (see PARA 296).

14 ie a reference under the Enterprise Act 2002 s 131 (see PARA 276).

15 Enterprise Act 2002 s 139(2)(a).

16 Enterprise Act 2002 s 139(2)(b). The text refers to a notice under s 155(1) or s 155(4) (see PARA 297).

17 Enterprise Act 2002 s 139(2)(c).

18 Enterprise Act 2002 s 139(6). A public interest consideration is finalised if: (1) it is specified in s 153 otherwise than by virtue of an order under s 153(3); or (2) it is specified in s 153 by virtue of an order under s 153(3) and the order providing for it to be so specified has been laid before, and approved by, Parliament in accordance with s 181(6) and within the period mentioned in that subsection: s 139(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/284. Notices given to the Competition Commission.

## ***B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION***

### **284. Notices given to the Competition Commission.**

An intervention notice given by the Secretary of State to the Competition Commission<sup>1</sup> must state:

- (1) the market investigation reference concerned<sup>2</sup>;
- (2) the date of the market investigation reference concerned<sup>3</sup>;

- (3) the public interest consideration or considerations which are, or may be, relevant to the case<sup>4</sup>; and
- (4) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it<sup>5</sup>.

Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to the case, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate<sup>6</sup>.

The Secretary of State may at any time revoke an intervention notice which has been given to the Commission and which is in force<sup>7</sup>. An intervention notice comes into force when it is given and ceases to be in force when the matter to which it relates is finally determined<sup>8</sup>.

1       le an intervention notice given under the Enterprise Act 2002 s 139(1) (see PARA 283). As to the meaning of 'intervention notice' see PARA 283 note 2. As to the Secretary of State see PARA 5. As to the Competition Commission see PARAS 9-12.

2       Enterprise Act 2002 s 140(1)(a). As to the meaning of 'market investigation reference' see PARA 276 note 3.

3       Enterprise Act 2002 s 140(1)(b).

4       Enterprise Act 2002 s 140(1)(c). As to the meaning of 'public interest consideration' see PARA 283 note 11. As to public interest considerations being finalised see PARA 283 note 18.

5       Enterprise Act 2002 s 140(1)(d).

6       Enterprise Act 2002 s 140(2).

7       Enterprise Act 2002 s 140(3). Where the Secretary of State revokes an intervention notice which has been given under s 139(1), the Commission must instead proceed under ss 134, 136-138 (see PARAS 279-282): s 151(2). In this case the period within which the Commission is under a duty to prepare and publish its report under s 136 is extended by an additional period of 20 days: s 151(3) (see PARA 281).

8       Enterprise Act 2002 s 140(4). For these purposes a matter to which an intervention notice under s 139(1) relates is finally determined if:

(1) the period permitted by s 144 (see PARA 288) for the preparation of the report of the Commission under s 142 (see PARA 286) and for action to be taken in relation to it under s 143(1) or s 143(3) has expired and no such report has been so prepared or no such action has been taken (s 140(5)(a));

(2) the Commission decides under s 145(1) (see PARA 289) to terminate its investigation (s 140(5)(b));

(3) the report of the Commission has been prepared under s 142 and published under s 143(1) within the period permitted by s 144 (s 140(5)(c));

(4) the Secretary of State fails to make and publish a decision under s 146(2) within the period required by s 146(3) (see PARA 290) (s 140(5)(d));

(5) the Secretary of State decides under s 146(2) that no eligible public interest consideration is relevant (s 140(5)(e));

(6) the Secretary of State decides under s 147(2) neither to accept an undertaking under s 159 nor to make an order under s 161 (see PARA 303) (s 140(5)(f));

(7) the Secretary of State accepts an undertaking under s 159 or makes an order under s 161 (see PARA 303) (s 140(5)(g)); or

(8) the Secretary of State decides to revoke the intervention notice concerned (s 140(5)(h)).

In the case falling within head (1) or (4) above, the matter is finally determined at the expiry of the period concerned: s 140(6)(a). In a case falling within head (2), (5), (6) or (8), the matter is finally determined on the making of the decision concerned: s 140(6)(b). In a case falling within head (3), the matter is finally determined on the publication of the report concerned: s 140(6)(c). In a case falling within head (7), the matter is finally determined on the acceptance of the undertaking concerned or (as the case may be) the making of the order concerned: s 140(6)(d). Note that this reference to the acceptance of the undertaking concerned or the making of the order concerned is (in a case where the enforcement action under s 147(2) involves the acceptance of a group of undertakings, the making of a group of orders or the acceptance and making of a group of undertakings and orders) to be treated as a reference to the acceptance or making of the last undertaking or order in the group; but undertakings or orders which vary, supersede or revoke earlier undertakings or orders are to be disregarded for the purposes of s 140(5)(g), (6)(d): s 140(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/285. Questions to be decided by the Competition Commission.

### **285. Questions to be decided by the Competition Commission.**

Where an intervention notice has been given by the Secretary of State to the Competition Commission<sup>1</sup> and is in force in relation to a market investigation reference<sup>2</sup>, then the Commission must decide on the following issues<sup>3</sup>.

The Commission must decide whether any feature, or combination of features, of each relevant market<sup>4</sup> prevents, restricts or distorts competition in connection with the supply or acquisition of any goods<sup>5</sup> or services in the United Kingdom or a part of the United Kingdom<sup>6</sup>. If the Commission has decided that there is an adverse effect on competition<sup>7</sup>, it must decide the following additional questions:

- (1) whether action should be taken by the Secretary of State<sup>8</sup> for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition<sup>9</sup>;
- (2) whether the Commission should recommend the taking of other action by the Secretary of State or action by persons other than itself and the Secretary of State for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition<sup>10</sup>; and
- (3) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented<sup>11</sup>.

If the Commission has decided that there is an adverse effect on competition, it must also decide separately the following questions<sup>12</sup>:

- (a) whether action should be taken by it<sup>13</sup> for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition<sup>14</sup>;
- (b) whether the Commission should recommend the taking of action by other persons for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has

resulted from, or may be expected to result from, the adverse effect on competition<sup>15</sup>; and  
 (c) in either case, if action should be taken, what action should be taken and what is to be remedied, mitigated or prevented<sup>16</sup>.

In deciding these questions<sup>17</sup>, the Commission must, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition<sup>18</sup>. The Commission may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned<sup>19</sup>.

1       Ie an intervention notice given under the Enterprise Act 2002 s 139(1) (see PARA 283). As to the meaning of 'intervention notice' see PARA 283 note 2. As to the Secretary of State see PARA 5. As to the Competition Commission see PARAS 9-12.

2       As to the meaning of 'market investigation reference' see PARA 276 note 3.

3       Enterprise Act 2002 s 141(1). As to the making of decisions under s 141 see PARA 11 note 13. As to the duty to consult see PARA 309.

4       As to the meaning of 'relevant market' see PARA 279 note 4. As to the meaning of 'feature of a market' see PARA 276.

5       As to the meanings of 'supply' and 'goods' see PARA 276 note 3.

6       Enterprise Act 2002 s 141(2). As to the meaning of 'United Kingdom' see PARA 401 note 1.

7       As to the meaning of 'adverse effect on competition' see PARA 279.

8       Ie under the Enterprise Act 2002 s 147 (see PARA 291).

9       Enterprise Act 2002 s 141(3)(a). As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.

10      Enterprise Act 2002 s 141(3)(b).

11      Enterprise Act 2002 s 141(3)(c).

12      This is on the assumption that it is proceeding as mentioned in the Enterprise Act 2002 s 148(1) (see PARA 292).

13      Ie under the Enterprise Act 2002 s 138 (see PARA 282).

14      Enterprise Act 2002 s 141(4)(a).

15      Enterprise Act 2002 s 141(4)(b).

16      Enterprise Act 2002 s 141(4)(c).

17      Ie the questions mentioned in the Enterprise Act 2002 s 141(3), (4) (see heads (1)-(3) and heads (a)-(c) in the text).

18      Enterprise Act 2002 s 141(5).

19      Enterprise Act 2002 s 141(6).

INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/286. Investigations and reports by the Competition Commission.

## **286. Investigations and reports by the Competition Commission.**

Where an intervention notice has been given by the Secretary of State to the Competition Commission<sup>1</sup> and is in force in relation to a market investigation reference<sup>2</sup>, the Commission must prepare a report on the reference and take the relevant action in relation to it<sup>3</sup> within the permitted period<sup>4</sup>. The report must, in particular, contain: (1) the decisions of the Commission on the questions which it is required to answer<sup>5</sup>; (2) its reasons for its decisions<sup>6</sup>; and (3) such information as the Commission considers appropriate for facilitating a proper understanding of those questions and of its reasons for its decisions<sup>7</sup>.

The Commission must carry out such investigations as it considers appropriate for the purposes of preparing the report<sup>8</sup>.

Where the Secretary of State is under a duty to publish the report, he may exclude a matter from the report if he considers that publication of the matter would be inappropriate<sup>9</sup>. The Commission must advise the Secretary of State as to the matters (if any) which it considers should be so excluded<sup>10</sup>.

1        Is an intervention notice given under the Enterprise Act 2002 s 139(1) (see PARA 283). As to the meaning of 'intervention notice' see PARA 283 note 2. As to the Secretary of State see PARA 5. As to the Competition Commission see PARAS 9-12.

2        As to the meaning of 'market investigation reference' see PARA 276 note 3.

3        Is action under the Enterprise Act 2002 s 143(1) or s 143(3) (see PARA 287).

4        Enterprise Act 2002 s 142(1). The text refers to the period permitted by s 144 (see PARA 288).

5        Enterprise Act 2002 s 142(2)(a). As to the questions it is required by virtue of s 141 to answer see PARA E111. Where, on a market investigation reference, a member of a group constituted in connection with the reference in pursuance of the Competition Act 1998 Sch 7 para 15 (see PARA 11) disagrees with any decisions contained in the report of the Commission as the decisions of the Commission, the report must, if the member so wishes, include a statement of his disagreement and of his reasons for disagreeing: s 178(1), (2).

6        Enterprise Act 2002 s 142(2)(b).

7        Enterprise Act 2002 s 142(2)(c).

8        Enterprise Act 2002 s 142(3).

9        As to the publication of reports see PARA 287. As to the requirement to publish information see PARA 311. References in ss 136(4)-(6), 143(2), (5)-(7), 148(3)-(5), 172(10) to the giving or laying of a report of the Commission are to be construed as references to the giving or laying of the report as published: s 177(5). Where the Secretary of State is under a duty to publish a report of the Commission under s 142, he may exclude a matter from the report if he considers that publication of the matter would be inappropriate: s 177(1), (2). In deciding what is inappropriate, the Secretary of State must have regard to the considerations mentioned in s 244 (see PARA 334): s 177(3).

10        Enterprise Act 2002 s 177(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/287. Publication of reports by the Competition Commission.

## 287. Publication of reports by the Competition Commission.

Where an intervention notice has been given by the Secretary of State to the Competition Commission<sup>1</sup> and is in force in relation to a market investigation reference<sup>2</sup>, the Commission must publish the report that it is required to prepare<sup>3</sup> if it contains:

- (1) the decision of the Commission that there is no adverse effect on competition<sup>4</sup>; or
- (2) the decisions of the Commission that there is one or more than one adverse effect on competition but that no action should be taken by it<sup>5</sup>.

In the case of a market investigation reference by the Office of Fair Trading (the 'OFT')<sup>6</sup>, the Commission must, at the same time as the report is published, give it to the OFT<sup>7</sup>. In the case of a market investigation reference by the appropriate Minister<sup>8</sup>, the Commission must give it to the appropriate Minister and give a copy of it to the OFT<sup>9</sup>.

Where the report<sup>10</sup> contains the decisions of the Commission that there is one or more than one adverse effect on competition and that action should be taken by it<sup>11</sup>, the Commission must give the report to the Secretary of State<sup>12</sup>. The Secretary of State must then publish this report<sup>13</sup>.

Where a market investigation reference has been made by the OFT or by the appropriate Minister<sup>14</sup> in circumstances in which a reference could have been made by a relevant sectoral regulator<sup>15</sup> the relevant authority<sup>16</sup> must, at the same time as the report is published<sup>17</sup>, give a copy of it to the relevant sectoral regulator concerned<sup>18</sup>. Where a reference has been made by a relevant sectoral regulator<sup>19</sup> the relevant authority must, at the same time as the report is published, give a copy of it to the OFT<sup>20</sup>.

1        Is an intervention notice given under the Enterprise Act 2002 s 139(1) (see PARA 283). As to the meaning of 'intervention notice' see PARA 283 note 2. As to the Secretary of State see PARA 5. As to the Competition Commission see PARAS 9-12.

2        As to the meaning of 'market investigation reference' see PARA 276 note 3.

3        Is the report it is required to prepare under the Enterprise Act 2002 s 142 (see PARA 286).

4        Enterprise Act 2002 s 143(1)(a). As to the meaning of 'adverse effect on competition' see PARA 279.

5        Enterprise Act 2002 s 143(1)(b). The text refers to the situation where the Commission decides on the question whether action should be taken by it under s 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from, or may be expected to result from, the adverse effect on competition (see s 141(4)(a)) and in relation to each adverse effect on competition, that no action should be taken by it: see s 143(1)(b).

6        Is a reference under the Enterprise Act 2002 s 131 (see PARA 276). As to the OFT see PARAS 6-8.

7        Enterprise Act 2002 s 143(2)(a).

8        Is a reference under the Enterprise Act 2002 s 132 (see PARA 277). As to the meaning of 'appropriate Minister' see PARA 277 note 1.

9        Enterprise Act 2002 s 143(2)(b).

10       See note 3.

11       The text refers to the situation where the Commission decides on the question whether action should be taken by it under the Enterprise Act 2002 s 138 for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from,

or may be expected to result from, the adverse effect on competition (see s 141(4)(a)) and in relation to at least one such adverse effect on competition, that action should be taken by it: see s 143(3).

12 Enterprise Act 2002 s 143(3).

13 The Secretary of State must publish, no later than publication of his decision under the Enterprise Act 2002 s 146(2) (see PARA 290) in relation to the case, a report of the Commission given to him under s 143(3) and not required to be published by virtue of s 148(2) (see PARA 292): s 143(4). The Secretary of State must, at the same time as the Commission's report given to him under s 143(3) is published under s 143(4), give a copy of it: (1) in the case of a reference under s 131, to the OFT; and (2) in the case of a reference under s 132, to any other Minister of the Crown who made the reference and to the OFT: s 143(5).

14 le by the OFT under the Enterprise Act 2002 s 131 (see PARA 276) or by the appropriate Minister under s 132 (see PARA 277).

15 le under the Enterprise Act 2002 s 131 as it has effect by virtue of a relevant sectoral enactment: s 143(6). As to the meanings of 'relevant sectoral regulator' and 'relevant sectoral enactment' see PARA 281 note 13.

16 For these purposes, 'relevant authority' means: (1) in the case of a report published under the Enterprise Act 2002 s 143(1), the Commission; and (2) in the case of a report published under the Enterprise Act 2002 s 143(4), the Secretary of State: s 143(8).

17 le under the Enterprise Act 2002 s 143(1) or s 143(4).

18 Enterprise Act 2002 s 143(6).

19 le under the Enterprise Act 2002 s 131 as it has effect by virtue of a relevant sectoral enactment: s 143(7).

20 Enterprise Act 2002 s 143(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/288. Time limits for investigations and reports.

## **288. Time limits for investigations and reports.**

The Competition Commission<sup>1</sup> must prepare its report<sup>2</sup> and publish it<sup>3</sup> or (as the case may be) give it to the Secretary of State<sup>4</sup> within the period of two years beginning with the date of the reference<sup>5</sup>. That period may be altered, subject to restrictions<sup>6</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 le under the Enterprise Act 2002 s 142 (see PARA 286).

3 le under the Enterprise Act 2002 s 143(1) (see PARA 287).

4 le under the Enterprise Act 2002 s 143(3) (see PARA 287). As to the Secretary of State see PARA 5.

5 Enterprise Act 2002 s 144(1).

6 The Secretary of State may by order amend the Enterprise Act 2002 s 144(1) so as to alter the period of two years mentioned in that subsection or any period for the time being mentioned in that subsection in substitution for that period: s 144(2). However, no alteration may be made which results in the period for the time being mentioned in s 144(1) exceeding two years: s 144(3). An order under s 144(2) does not affect any period of time within which, in relation to a market investigation reference, the Commission is under a duty to prepare its report under s 142 and take action in relation to it under s 143(1) or s 143(3) if the Commission is already under that duty in relation to that reference when the order is made: s 144(4). Before making an order

under s 144(2) the Secretary of State must consult the Commission and such other persons as he considers appropriate: s 144(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/289. Restrictions where public interest considerations not finalised.

## **289. Restrictions where public interest considerations not finalised.**

The Competition Commission<sup>1</sup> must terminate its investigation<sup>2</sup> if:

- (1) the intervention notice<sup>3</sup> concerned mentions a public interest consideration<sup>4</sup> which was not finalised on the giving of that notice or public interest considerations which, at that time, were not finalised<sup>5</sup>;
- (2) no other public interest consideration is mentioned in the notice<sup>6</sup>;
- (3) at least 24 weeks have elapsed since the giving of the notice<sup>7</sup>; and
- (4) the public interest consideration mentioned in the notice has not been finalised within that period of 24 weeks or (as the case may be) none of the public interest considerations mentioned in the notice has been finalised within that period of 24 weeks<sup>8</sup>.

Where the intervention notice concerned mentions a public interest consideration which is not finalised on the giving of the notice, the Commission must not give its report to the Secretary of State<sup>9</sup> unless the period of 24 weeks beginning with the giving of the intervention notice concerned has expired or the public interest consideration concerned has been finalised<sup>10</sup>.

In reporting on the questions to be decided by it<sup>11</sup>, the Commission must disregard:

- (a) any public interest consideration which has not been finalised before the giving of the report<sup>12</sup>; and
- (b) any public interest consideration which was not finalised on the giving of the intervention notice concerned and has not been finalised within the period of 24 weeks beginning with the giving of the notice concerned<sup>13</sup>.

However, these provisions<sup>14</sup> are without prejudice to the power of the Commission to carry out investigations in relation to any public interest consideration to which it might be able to have regard in its report<sup>15</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 In its investigation under the Enterprise Act 2002 s 142 for the purposes of preparing a report under s 142 (see PARA 286).

Where the Commission terminates its investigation under s 145(1), it must proceed under ss 134, 136-138 (see PARAS 279-282): s 151(4). Where the Commission is proceeding in this way, the period within which the Commission must prepare and publish its report under s 136 is extended by an additional period of 20 days: s 151(5). In determining this period of 20 days no account is taken of (1) Saturday, Sunday, Good Friday and Christmas Day; and (2) any day which is a bank holiday in England and Wales: s 151(6).

3 As to the meaning of 'intervention notice' see PARA 283 note 2.

4 As to the meaning of 'public interest consideration' see PARA 283 note 11.



- 5 Enterprise Act 2002 s 145(1)(a). As to public interest considerations being finalised see PARA 283 note 18.
- 6 Enterprise Act 2002 s 145(1)(b).
- 7 Enterprise Act 2002 s 145(1)(c).
- 8 Enterprise Act 2002 s 145(1)(d). As to the requirement to publish information see PARA 311.
- 9 le under the Enterprise Act 2002 s 142 (see PARA 286) in accordance with s 143(3) (see PARA 287).
- 10 Enterprise Act 2002 s 145(2).
- 11 le the questions mentioned in the Enterprise Act 2002 s 141(3) (see PARA 285 heads (1)-(3)).
- 12 Enterprise Act 2002 s 145(3).
- 13 Enterprise Act 2002 s 145(4).
- 14 le the Enterprise Act 2002 s 145(1)-(4) (see the text and notes 1-13).
- 15 Enterprise Act 2002 s 145(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/290. Decision of the Secretary of State.

## **290. Decision of the Secretary of State.**

Where the Secretary of State<sup>1</sup> has received a report of the Competition Commission<sup>2</sup> which:

- (1) has been prepared in relation to an intervention notice<sup>3</sup>;
- (2) contains the decisions that there is one or more than one adverse effect on competition<sup>4</sup> and, on the question<sup>5</sup> whether action should be taken by the Commission<sup>6</sup> for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers<sup>7</sup> so far as it has resulted from, or may be expected to result from, the adverse effect on competition, and in relation to at least one such adverse effect, that action should be taken by it<sup>8</sup>; and
- (3) has been given to the Secretary of State in the required manner<sup>9</sup>,

then he must decide whether any eligible public interest considerations<sup>10</sup> are relevant to any action<sup>11</sup> which the Commission should take for the purpose of remedying, mitigating or preventing any adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted or may be expected to result from any adverse effect on competition<sup>12</sup>.

The Secretary of State must make and publish his decision within the period of 90 days beginning with the receipt of the report of the Commission<sup>13</sup>.

- 1 As to the Secretary of State see PARA 5.
- 2 As to the Competition Commission see PARAS 9-12.

- 3 Enterprise Act 2002 s 146(1)(a). The text refers to a report which is prepared under s 142 (see PARA 286). As to the meaning of 'intervention notice' see PARA 283 note 2.
- 4 As to the meaning of 'adverse effect on competition' see PARA 279.
- 5 In the question in the Enterprise Act 2002 s 141(4)(a) (see PARA 285).
- 6 In under the Enterprise Act 2002 s 138 (see PARA 282).
- 7 As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.
- 8 Enterprise Act 2002 ss 141(4)(a), 146(1)(b).
- 9 Enterprise Act 2002 s 146(1)(c). The text refers to the requirements of s 143(3) (see PARA 287).
- 10 The Enterprise Act 2002 s 146(2) applies both to the situation where there is only one eligible public interest consideration and to the situation where there is more than one eligible public interest consideration. 'Eligible public interest consideration' means a public interest consideration which (1) was mentioned in the intervention notice concerned; and (2) was not disregarded by the Commission for the purposes of its report under the Enterprise Act 2002 s 142: s 146(4). As to the meaning of 'public interest consideration' see PARA 283 note 11.
- 11 In any action which is mentioned in the report by virtue of the Enterprise Act 2002 s 141(4)(a), (c) (see PARA 285).
- 12 Enterprise Act 2002 s 146(1), (2). As to the requirement to publish information see PARA 311.
- 13 Enterprise Act 2002 s 146(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/291. Remedial action by the Secretary of State.

## **291. Remedial action by the Secretary of State.**

Where the Secretary of State has decided<sup>1</sup> that an eligible public interest consideration<sup>2</sup> is relevant<sup>3</sup> and has published his decision within the requisite period<sup>4</sup>, then he may, in relation to any adverse effect on competition<sup>5</sup> identified in the report concerned, take such action<sup>6</sup> as he considers to be: (1) reasonable and practicable to remedy, mitigate or prevent the adverse effect on competition concerned, or to remedy, mitigate or prevent any detrimental effect on customers<sup>7</sup> so far as it has resulted from, or may be expected to result from, the adverse effect on competition<sup>8</sup>; and (2) appropriate in the light of the eligible public interest consideration concerned<sup>9</sup>.

In making the decision as to what action to take, the Secretary of State must, in particular, have regard to: (a) the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition<sup>10</sup>; and (b) the report of the Competition Commission<sup>11</sup>. In having regard to the Commission's report, the Secretary of State must not challenge the decision of the Commission contained in the report that there is one or more than one adverse effect on competition<sup>12</sup>. In making the decision as to what action to take, the Secretary of State may, in particular, have regard to the effect of any action on any relevant customer benefits of the feature or features of the market concerned<sup>13</sup>.

The Secretary of State may take no action to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if no detrimental effect on customers has resulted from the adverse

effect on competition, and the adverse effect on competition is not being remedied, mitigated or prevented<sup>14</sup>.

1       le under the Enterprise Act 2002 s 146(2) within the period required by s 146(3) (see PARA 290). As to the Secretary of State see PARA 5.

2       The Enterprise Act 2002 s 147 applies both to the situation where there is only one eligible public interest consideration and to the situation where there is more than one eligible public interest consideration. As to the meaning of 'eligible public interest consideration' see PARA 290 note 10; definition applied by s 147(7). As to the meaning of 'public interest consideration' see PARA 283 note 11.

3       le as mentioned in the Enterprise Act 2002 s 146(2) (see PARA 290).

4       Enterprise Act 2002 s 147(1). As to the requisite period see s 146(3); and PARA 290.

5       As to the meaning of 'adverse effect on competition' see PARA 279.

6       le such action under the Enterprise Act 2002 s 159 (see PARA 301) or s 161 (see PARA 303).

7       As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.

8       Enterprise Act 2002 s 147(2)(a). As to the requirement to publish information see PARA 311.

9       Enterprise Act 2002 s 147(2)(b). See note 2.

10       Enterprise Act 2002 s 147(3)(a).

11       Enterprise Act 2002 s 147(3)(b). The text refers to the report prepared under s 142 (see PARA 286). As to the Competition Commission see PARAS 9-12.

12       Enterprise Act 2002 s 147(4).

13       Enterprise Act 2002 s 147(5). As to the meaning of 'feature of a market' see PARA 276. As to the meaning of 'relevant customer benefit' see PARA 279 note 13.

14       Enterprise Act 2002 s 147(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/B. INTERVENTION NOTICES GIVEN TO THE COMPETITION COMMISSION/292. Reversion of the matter to the Competition Commission.

## **292. Reversion of the matter to the Competition Commission.**

If the Secretary of State<sup>1</sup> fails, within the requisite period<sup>2</sup>, to make and publish his decision<sup>3</sup> as to whether any eligible public interest consideration<sup>4</sup> is relevant or if he decides that no eligible public interest consideration is relevant, then the Competition Commission<sup>5</sup> must proceed<sup>6</sup> to remedy, mitigate or prevent the adverse effect on competition as if the report had been prepared<sup>7</sup> and published<sup>8</sup> in response to the market investigation reference<sup>9</sup>.

Where the Commission intends to proceed in a way which is not consistent with its previous decisions as included in its report<sup>10</sup>, it must not so proceed without the consent of the Secretary of State<sup>11</sup>. The Secretary of State may not withhold his consent to this unless he believes that the proposed alternative way of proceeding will operate against the public interest<sup>12</sup>. A proposed alternative way of proceeding will operate against the public interest only if any eligible public interest consideration or considerations outweigh the considerations which have led the Commission to propose proceeding in that way<sup>13</sup>. In deciding whether to withhold his

consent, the Secretary of State must accept the Commission's view of what (if the only relevant consideration were how to remedy, mitigate or prevent the adverse effect on competition concerned or any detrimental effect on customers so far as resulting from the adverse effect on competition) would be the most appropriate way to proceed<sup>14</sup>.

1 As to the Secretary of State see PARA 5.

2 Ie within the period required by the Enterprise Act 2002 s 146(3) (see PARA 290).

3 Ie his decision under the Enterprise Act 2002 s 146(2) (see PARA 290).

4 As to the meaning of 'eligible public interest consideration' see PARA 290 note 10; definition applied by the Enterprise Act 2002 s 148(11).

5 As to the Competition Commission see PARAS 9-12.

6 Ie under the Enterprise Act 2002 s 138 (see PARA 282).

7 Ie prepared under the Enterprise Act 2002 s 136 (see PARA 281).

8 Ie within the period permitted by the Enterprise Act 2002 s 137 (see PARA 281).

9 Enterprise Act 2002 s 148(1). As to the meaning of 'market investigation reference' see PARA 276 note 3.

The Commission must publish the report which has been prepared by it under s 142 (if still unpublished) (see PARA 286) as soon as it becomes able to proceed by virtue of s 148(1): s 148(2). At the same time as its report is published under s 148(2), the Commission must, in the case of a reference under s 131 (see PARA 276), give a copy of it to the Office of Fair Trading (the 'OFT'), and in the case of a reference under s 132 (see PARA 277), give a copy of it to any Minister of the Crown who made the reference (other than the Secretary of State) and to the OFT: s 148(3). As to the OFT see PARAS 6-8.

Where a reference has been made by the OFT under s 131 or by the appropriate Minister under s 132 in circumstances in which a reference could have been made by a relevant sectoral regulator under s 131 as it has effect by virtue of a relevant sectoral enactment, the Commission must, at the same time as its report is published under s 148(2), give a copy of it to the relevant sectoral regulator concerned: s 148(4). As to the meaning of 'appropriate Minister' see PARA 277 note 1. As to the meanings of 'relevant sectoral regulator' and 'relevant sectoral enactment' see PARA 281 note 13. Where a reference has been made by a relevant sectoral regulator under s 131 as it has effect by virtue of a relevant sectoral enactment, the Commission must, at the same time as its report is published under s 148(2), give a copy of it to the OFT: s 148(5).

In relation to proceedings by virtue of s 148(1), the reference in s 138(3) to decisions of the Commission included in its report by virtue of s 134(4) is to be construed as a reference to decisions which were included in the report of the Commission by virtue of s 141(4): s 148(6).

10 Ie by virtue of the Enterprise Act 2002 s 141(4) (see PARA 285).

11 Enterprise Act 2002 s 148(7).

12 Enterprise Act 2002 s 148(8).

13 Enterprise Act 2002 s 148(9).

14 Enterprise Act 2002 s 148(10).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/C. INTERVENTION NOTICES GIVEN TO THE OFFICE OF FAIR TRADING/293. Notices given to the Office of Fair Trading.

### **C. INTERVENTION NOTICES GIVEN TO THE OFFICE OF FAIR TRADING**

### 293. Notices given to the Office of Fair Trading.

An intervention notice given by the Secretary of State to the Office of Fair Trading (the 'OFT')<sup>1</sup> must state:

- (1) the proposed undertaking which may be accepted by the OFT<sup>2</sup>;
- (2) the notice of the proposed undertaking<sup>3</sup>;
- (3) the public interest consideration or considerations which are, or may be, relevant to the case<sup>4</sup>; and
- (4) where any public interest consideration concerned is not finalised, the proposed timetable for finalising it<sup>5</sup>.

Where the Secretary of State believes that it is or may be the case that two or more public interest considerations are relevant to the case, he may decide not to mention in the intervention notice such of those considerations as he considers appropriate<sup>6</sup>.

The Secretary of State may at any time revoke an intervention notice which has been given to the OFT and which is in force<sup>7</sup>. An intervention notice comes into force when it is given and ceases to be in force on the occurrence of any of the following events<sup>8</sup>:

- (a) the acceptance by the OFT with the consent of the Secretary of State of an undertaking which is the same as the proposed undertaking mentioned in the intervention notice<sup>9</sup> or which does not differ from it in any material respect<sup>10</sup>;
- (b) the decision of the OFT to proceed neither with the proposed undertaking mentioned in the intervention notice<sup>11</sup> nor a proposed undertaking which does not differ from it in any material respect<sup>12</sup>; or
- (c) the decision of the Secretary of State to revoke the intervention notice concerned<sup>13</sup>.

1        Ie an intervention notice given under the Enterprise Act 2002 s 139(2) (see PARA 283). As to the meaning of 'intervention notice' see PARA 283 note 2. As to the Secretary of State see PARA 5. As to the OFT see PARAS 6-8. As to the requirement to publish information see PARA 311.

2        Enterprise Act 2002 s 149(1)(a).

3        Enterprise Act 2002 s 149(1)(b). The text refers to the notice under s 155(1) or s 155(4) (see PARA 297).

4        Enterprise Act 2002 s 149(1)(c). As to the meaning of 'public interest consideration' see PARA 283 note 11.

5        Enterprise Act 2002 s 149(1)(d). As to public interest considerations being finalised see PARA 283 note 18.

6        Enterprise Act 2002 s 149(2).

7        Enterprise Act 2002 s 149(3).

8        Enterprise Act 2002 s 149(4).

9        Ie by virtue of the Enterprise Act 2002 s 149(1)(a) (see head (1) in the text).

10       Enterprise Act 2002 s 149(5)(a).

11       See note 9.

12       Enterprise Act 2002 s 149(5)(b).

13       Enterprise Act 2002 s 149(5)(c).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/C. INTERVENTION NOTICES GIVEN TO THE OFFICE OF FAIR TRADING/294. Power of veto of the Secretary of State.

#### **294. Power of veto of the Secretary of State.**

Where an intervention notice has been given by the Secretary of State to the Office of Fair Trading (the 'OFT')<sup>1</sup> and it is in force, the OFT may not, without the consent of the Secretary of State, accept the proposed undertaking concerned or a proposed undertaking which does not differ from it in any material respect<sup>2</sup>. The Secretary of State must withhold his consent if he believes that it is or may be the case that the proposed undertaking will, if accepted, operate against the public interest<sup>3</sup>. A proposed undertaking will, if accepted, operate against the public interest only if any public interest consideration which is mentioned in the intervention notice concerned and has been finalised, or any public interest considerations which are so mentioned and have been finalised, outweigh the considerations which have led the OFT to propose accepting the undertaking<sup>4</sup>. In making his decision as to whether or not to withhold consent, the Secretary of State must accept the OFT's view of what undertakings, if the only relevant consideration were how to remedy, mitigate or prevent the adverse effect on competition<sup>5</sup> concerned or any detrimental effect on customers<sup>6</sup> so far as resulting from the adverse effect on competition, would be most appropriate<sup>7</sup>.

Where a public interest consideration which is mentioned in the intervention notice concerned is not finalised on the giving of the notice, the Secretary of State may not make his decision as to whether to give his consent before: (1) the end of the period of 24 weeks beginning with the giving of the intervention notice; or (2) if earlier, the date on which the public interest consideration concerned has been finalised<sup>8</sup>.

Subject to the provisions described above<sup>9</sup>, the Secretary of State may not withhold his consent to the OFT accepting the undertaking<sup>10</sup>.

1       Ie an intervention notice given under the Enterprise Act 2002 s 139(2) (see PARA 283). As to the meaning of 'intervention notice' see PARA 283 note 2. As to the Secretary of State see PARA 5. As to the OFT see PARAS 6-8.

2       Enterprise Act 2002 s 150(1).

3       Enterprise Act 2002 s 150(2).

4       Enterprise Act 2002 s 150(3). As to public interest considerations being finalised see PARA 283 note 18.

5       As to the meaning of 'adverse effect on competition' see PARA 279.

6       As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.

7       Enterprise Act 2002 s 150(4).

8       Enterprise Act 2002 s 150(5).

9       Ie the Enterprise Act 2002 s 150(2)-(5): see the text and notes 3-8.

10      Enterprise Act 2002 s 150(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(ii) Public Interest Cases/D. NATIONAL SECURITY/295. Duties of the Office of Fair Trading and the Competition Commission in relation to national security.

#### ***D. NATIONAL SECURITY***

##### **295. Duties of the Office of Fair Trading and the Competition Commission in relation to national security.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> must, in considering whether to make a market investigation reference<sup>2</sup>, bring to the attention of the Secretary of State<sup>3</sup> any case which it believes raises any consideration of national security<sup>4</sup> unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case<sup>5</sup>.

The Competition Commission<sup>6</sup> must, in investigating any market investigation reference made to it<sup>7</sup> within the previous four months, bring to the attention of the Secretary of State any case which it believes raises any national security consideration<sup>8</sup> unless it believes that the Secretary of State would consider any such consideration immaterial in the context of the particular case<sup>9</sup>.

1 As to the OFT see PARAS 6-8.

2 Ie under the Enterprise Act 2002 s 131 (see PARA 276). As to the meaning of 'market investigation reference' see PARA 276 note 3.

3 As to the Secretary of State see PARA 5.

4 Enterprise Act 2002 s 153(1). 'National security' includes public security; and 'public security' has the same meaning as in art 21(4) of EC Council Reg 139/2004 (OJ L24, 29.1.2004, p 1) on the control of concentrations between undertakings (the EC Merger Regulation): Enterprise Act 2002 s 153(2) (amended by SI 2004/1079). The Secretary of State may by order modify the Enterprise Act 2002 s 153 for the purpose of specifying a new consideration or removing or amending any consideration which is for the time being specified: s 153(3). Such an order may apply in relation to cases under consideration by the OFT, by the Secretary of State, by the appropriate Minister (other than the Secretary of State acting alone) or by the Competition Commission before the making of the order as well as cases under consideration on or after the making of the order: s 153(4). The OFT and the Commission must bring to the attention of the Secretary of State any representations about exercising his power under s 153(3) which have been made to the OFT or (as the case may be) the Commission: s 152(3). As to the meaning of 'appropriate Minister' see PARA 277 note 1.

5 Enterprise Act 2002 s 152(1). As to the requirement to publish information see PARA 311.

6 As to the Competition Commission see PARAS 9-12.

7 Ie under the Enterprise Act 2002 s 131 (see PARA 276) or s 132 (see PARA 277).

8 See note 4.

9 Enterprise Act 2002 s 152(2). As to the requirement to publish information see PARA 311.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/296. Undertakings in lieu of market investigation references.

#### **(iii) Enforcement**

## **A. UNDERTAKINGS AND ORDERS**

### **296. Undertakings in lieu of market investigation references.**

If the Office of Fair Trading (the 'OFT')<sup>1</sup> considers that it has the power to make a market investigation reference<sup>2</sup> and otherwise intends to make such a reference<sup>3</sup>, the OFT may, instead of making such a reference and for the purpose of remedying, mitigating or preventing:

- (1) any adverse effect on competition<sup>4</sup> concerned; or
- (2) any detrimental effect on customers<sup>5</sup> so far as it has resulted from, or may be expected to result from, the adverse effect on competition,

accept, from such persons as it considers appropriate, undertakings to take such action<sup>6</sup> as it considers appropriate<sup>7</sup>.

In proceeding under the above provisions<sup>8</sup>, the OFT must, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the adverse effect on competition concerned and any detrimental effects on customers so far as resulting from the adverse effect on competition<sup>9</sup>. In so proceeding, the OFT may, in particular, have regard to the effect of any action on any relevant customer benefits<sup>10</sup> of the feature or features of the market<sup>11</sup> concerned<sup>12</sup>.

The OFT must take no action under the above provisions<sup>13</sup> to remedy, mitigate or prevent any detrimental effect on customers so far as it may be expected to result from the adverse effect on competition concerned if:

- (a) no detrimental effect on customers has resulted from the adverse effect on competition; and
- (b) the adverse effect on competition is not being remedied, mitigated or prevented<sup>14</sup>.

An undertaking under these provisions comes into force when accepted<sup>15</sup>. It may be varied or superseded by another undertaking<sup>16</sup> and may be released by the OFT<sup>17</sup>. The OFT must, as soon as reasonably practicable, consider any representations received by it in relation to varying or releasing such an undertaking<sup>18</sup>.

The provisions set out above are subject to the Secretary of State's power to veto the acceptance of an undertaking<sup>19</sup> and also to procedural requirements<sup>20</sup>.

1 As to the OFT see PARAS 6-8.

2 I.e. a reference under the Enterprise Act 2002 s 131: see PARA 276. As to the meaning of 'market investigation reference' see PARA 276 note 3.

3 Enterprise Act 2002 s 154(1). As to the duty to consult see PARA 309.

4 As to the meaning of 'adverse effect on competition' see PARA 279.

5 As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.

6 As to the meaning of 'action' and 'taking of action' see PARA 184 note 9.

7 Enterprise Act 2002 s 154(2). The provision which may be contained in such an undertaking is not limited to the provision which is permitted by Sch 8 (paras 1-23) (provision that may be contained in certain enforcement orders: see PARA 232 et seq): s 164(1).

8 I.e. under the Enterprise Act 2002 s 154(2): see the text and notes 4-7.



- 9 Enterprise Act 2002 s 154(3).
- 10 As to the meaning of 'relevant customer benefit' see PARA 279 note 13.
- 11 As to the meaning of 'feature of a market' see PARA 276.
- 12 Enterprise Act 2002 s 154(4).
- 13 See note 8.
- 14 Enterprise Act 2002 s 154(5).
- 15 Enterprise Act 2002 s 154(6)(a).
- 16 Enterprise Act 2002 s 154(6)(b).
- 17 Enterprise Act 2002 s 154(6)(c). Schedule 10 paras 6-8 (but not Sch 10 para 9) (procedural requirements before terminating undertakings: see PARA 241) apply in relation to the proposed release of undertakings under s 154 (other than in connection with accepting an undertaking under s 154 which varies or supersedes an undertaking under that provision) as they apply in relation to the proposed release of undertakings under s 73 (see PARA 217): s 155(10).
- 18 Enterprise Act 2002 s 154(7).
- 19 Ie the Enterprise Act 2002 s 154 is subject to s 150 (see PARA 294): s 154(8). As to the Secretary of State see PARA 5.
- 20 Ie the Enterprise Act 2002 s 154 is subject to s 155 (see note 17; and PARA 297): s 154(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/297. Procedural requirements in relation to undertakings in lieu of market investigation references.

### **297. Procedural requirements in relation to undertakings in lieu of market investigation references.**

Before accepting an undertaking in lieu of a market investigation reference<sup>1</sup>, other than an undertaking which varies such an undertaking<sup>2</sup> but not in any material respect, the Office of Fair Trading (the 'OFT')<sup>3</sup> must publish notice of the proposed undertaking<sup>4</sup> and must consider any representations made in accordance with the notice and not withdrawn<sup>5</sup>. Such a notice must state:

- (1) that the OFT proposes to accept the undertaking<sup>6</sup>;
- (2) the purpose and effect of the undertaking<sup>7</sup>;
- (3) the situation that the undertaking is seeking to deal with<sup>8</sup>;
- (4) any other facts which the OFT considers justify the acceptance of the undertaking<sup>9</sup>;
- (5) a means of gaining access to an accurate version of the proposed undertaking at all reasonable times<sup>10</sup>; and
- (6) the period<sup>11</sup> within which representations may be made in relation to the proposed undertaking<sup>12</sup>.

The matters to be included in such a notice by virtue of heads (1) to (6) above must, in particular, include:

- (a) the terms of the market investigation reference<sup>13</sup> which the OFT considers that it has power to make and which it otherwise intends to make<sup>14</sup>; and
- (b) the adverse effect on competition<sup>15</sup>, and any detrimental effect on customers<sup>16</sup> so far as resulting from the adverse effect on competition, which the OFT has identified<sup>17</sup>.

The OFT must not accept the undertaking with modifications unless it publishes notice of the proposed modifications<sup>18</sup> and considers any representations made in accordance with the notice and not withdrawn<sup>19</sup>. Such a notice must state:

- (i) the proposed modifications<sup>20</sup>;
- (ii) the reasons for them<sup>21</sup>; and
- (iii) the period<sup>22</sup> within which representations may be made in relation to the proposed modifications<sup>23</sup>.

If, after publishing notice as described above<sup>24</sup> the OFT decides not to accept the undertaking concerned and not to proceed<sup>25</sup> it must publish notice of that decision<sup>26</sup>.

As soon as practicable after accepting an undertaking to which the above provisions apply, the OFT must serve a copy of the undertaking on any person by whom it is given<sup>27</sup> and must publish the undertaking<sup>28</sup>.

1       Ie an undertaking under the Enterprise Act 2002 s 154: see PARA 296. As to the meaning of 'market investigation reference' see PARA 276 note 3.

2       As to the variation of undertakings under the Enterprise Act 2002 s 154 see PARA 296 text and note 16.

3       As to the OFT see PARAS 6-8.

4       Enterprise Act 2002 s 155(1)(a). As to the meaning of 'publish' see PARA 186 note 2; and as to the meaning of 'notice' see PARA 314 note 6.

5       Enterprise Act 2002 s 155(1)(b).

6       Enterprise Act 2002 s 155(2)(a).

7       Enterprise Act 2002 s 155(2)(b).

8       Enterprise Act 2002 s 155(2)(c).

9       Enterprise Act 2002 s 155(2)(d).

10      Enterprise Act 2002 s 155(2)(e).

11      The period referred to in head (6) in the text must not be less than 15 days starting with the date of publication of the notice: Enterprise Act 2002 s 155(2)(f).

12      Enterprise Act 2002 s 155(2)(f).

13      Ie the reference under the Enterprise Act 2002 s 131: see PARA 276.

14      Enterprise Act 2002 s 155(3)(a).

15      As to the meaning of 'adverse effect on competition' see PARA 279.

16      As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.

17      Enterprise Act 2002 s 155(3)(b).

18 Enterprise Act 2002 s 155(4)(a). The requirements of s 155(4) (and those of s 155(1)) do not apply if the OFT (1) has already published notice under s 155(1) but not s 155(4) in relation to the proposed undertaking; and (2) considers that the modifications which are now being proposed are not material in any respect: s 155(8). Nor do those requirements apply if the OFT (a) has already published notice under s 155(1) and (4) in relation to the matter concerned; and (b) considers that the further modifications which are now being proposed do not differ in any material respect from the modifications in relation to which notice was last given under s 155(4): s 155(9).

19 Enterprise Act 2002 s 155(4)(b); and see note 18.

20 Enterprise Act 2002 s 155(5)(a).

21 Enterprise Act 2002 s 155(5)(b).

22 The period referred to in head (iii) in the text must be not less than seven days starting with the date of the publication of the notice under the Enterprise Act 2002 s 155(4): s 155(5)(c).

23 Enterprise Act 2002 s 155(5)(c).

24 Ie under the Enterprise Act 2002 s 155(1) (see the text and notes 1-5) or s 155(4) (see the text and notes 18-19).

25 Ie not to proceed by virtue of the Enterprise Act 2002 s 155(8) or (9): see note 18.

26 Enterprise Act 2002 s 155(6).

27 Enterprise Act 2002 s 155(7)(a).

28 Enterprise Act 2002 s 155(7)(b).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/298. Effect of undertakings in lieu of market investigation references.

## **298. Effect of undertakings in lieu of market investigation references.**

No market investigation reference<sup>1</sup> must be made by the Office of Fair Trading (the 'OFT')<sup>2</sup> or the appropriate Minister<sup>3</sup> in relation to any feature, or combination of features, of a market<sup>4</sup> in the United Kingdom<sup>5</sup> for goods or services<sup>6</sup> if:

- (1) the OFT has accepted an undertaking or group of undertakings in lieu of a market investigation reference<sup>7</sup> within the previous 12 months<sup>8</sup>; and
- (2) the goods<sup>9</sup> or services to which the undertaking or group of undertakings relates are of the same description as the goods or services to which the feature, or combination of features, relates<sup>10</sup>.

The above provisions do not, however, prevent the making of a market investigation reference if:

- (a) the OFT considers that any undertaking concerned has been breached and has given notice<sup>11</sup> of that fact to the person responsible for giving the undertaking<sup>12</sup>; or
- (b) the person responsible for giving any undertaking concerned supplied, in connection with the matter, information to the OFT which was false or misleading in a material respect<sup>13</sup>.

- 1 As to the meaning of 'market investigation reference' see PARA 276 note 3; and as to market investigation references see PARA 276 et seq.
- 2 As to the OFT see PARAS 6-8.
- 3 As to the meaning of 'appropriate Minister' see PARA 277 note 1.
- 4 As to the meaning of 'feature of a market' see PARA 276.
- 5 As to the meaning of 'United Kingdom' see PARA 401 note 1.
- 6 As to the meaning of 'market for goods or services' see PARA 276 note 3.
- 7 Is an undertaking or group of undertakings under the Enterprise Act 2002 s 154: see PARA 296.
- 8 Enterprise Act 2002 s 156(1)(a).
- 9 As to the meaning of 'goods' see PARA 276 note 3.
- 10 Enterprise Act 2002 s 156(1)(b).
- 11 As to the meaning of 'notice' see PARA 314 note 6.
- 12 Enterprise Act 2002 s 156(2)(a).
- 13 Enterprise Act 2002 s 156(2)(b).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/299. Interim undertakings.

### **299. Interim undertakings.**

The relevant authority<sup>1</sup> may, for the purpose of preventing pre-emptive action<sup>2</sup>, accept, from such persons as the relevant authority considers appropriate, undertakings to take such action<sup>3</sup> as the relevant authority considers appropriate<sup>4</sup> where:

- (1) a market investigation reference<sup>5</sup> has been made<sup>6</sup>;
- (2) a report has been published<sup>7</sup> within the permitted period<sup>8</sup> or, as the case may be, a report prepared<sup>9</sup> and given to the Secretary of State<sup>10</sup> within the permitted period<sup>11</sup> has been published<sup>12</sup>; and
- (3) the market investigation reference concerned is not finally determined<sup>13</sup>.

Such an undertaking<sup>14</sup>:

- (a) comes into force when accepted<sup>15</sup>;
- (b) may be varied or superseded by another undertaking<sup>16</sup>; and
- (c) may be released by the relevant authority<sup>17</sup>;

and the relevant authority must, as soon as reasonably practicable, consider any representations received by the relevant authority in relation to varying or releasing such an undertaking<sup>18</sup>.

If it has not previously ceased to be in force, an undertaking under these provisions ceases to be in force when the market investigation reference is finally determined<sup>19</sup>.

1 For these purposes and the purposes of the Enterprise Act 2002 s 158 (see PARA 300), the 'relevant authority' means (1) where an intervention notice is in force in relation to the market investigation reference, the Secretary of State; (2) in any other case, the Competition Commission: ss 157(6), 273. As to the meaning of 'intervention notice' see PARA 283 note 2; as to the meaning of 'market investigation reference' see PARA 276 note 3; as to the Secretary of State see PARA 5; and as to the Competition Commission see PARAS 9-12. As to the requirement to publish information see PARA 311.

2 For these purposes and the purposes of the Enterprise Act 2002 s 158 (see PARA 300), 'pre-emptive action' means action which might impede the taking of any action under s 138(2) (see PARA 282) or (as the case may be) s 147(2) (see PARA 291) in relation to the market investigation reference concerned: s 157(6). See also note 3.

3 As to the meaning of 'action' and 'taking of action' see PARA 184 note 9.

4 Enterprise Act 2002 s 157(2).

5 As to market investigation references see PARA 276 et seq.

6 Enterprise Act 2002 s 157(1)(a).

7 Ie under the Enterprise Act 2002 s 136: see PARA 281. As to the meaning of 'publish' see PARA 280 note 7.

8 Ie the period permitted by the Enterprise Act 2002 s 137: see PARA 281.

9 Ie under the Enterprise Act 2002 s 142: see PARA 286.

10 Ie under the Enterprise Act 2002 s 143(3): see PARA 287.

11 Ie the period permitted by the Enterprise Act 2002 s 144: see PARA 288.

12 Enterprise Act 2002 s 157(1)(b).

13 Enterprise Act 2002 s 157(1)(c). As to when a market investigation reference is finally determined see s 183(3)-(6); and PARA 276. As to the requirement to publish information see PARA 311.

14 Ie an undertaking under the Enterprise Act 2002 s 157. The provision which may be contained in such an undertaking is not limited to the provision which is permitted by Sch 8 (paras 1-23) (provision that may be contained in certain enforcement orders: see PARA 232 et seq): s 164(1).

15 Enterprise Act 2002 s 157(3)(a).

16 Enterprise Act 2002 s 157(3)(b).

17 Enterprise Act 2002 s 157(3)(c).

18 Enterprise Act 2002 s 157(5).

19 Enterprise Act 2002 s 157(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/300. Interim orders.

### **300. Interim orders.**

The following provisions<sup>1</sup> apply where:

- (1) a market investigation reference<sup>2</sup> has been made<sup>3</sup>;

- (2) a report has been published<sup>4</sup> within the permitted period<sup>5</sup> or, as the case may be, a report prepared<sup>6</sup> and given to the Secretary of State<sup>7</sup> within the permitted period<sup>8</sup> has been published<sup>9</sup>; and
- (3) the market investigation reference concerned is not finally determined<sup>10</sup>.

The relevant authority<sup>11</sup> may by order<sup>12</sup>, for the purpose of preventing pre-emptive action<sup>13</sup>:

- (a) prohibit or restrict the doing of things which the relevant authority considers would constitute pre-emptive action<sup>14</sup>;
- (b) impose on any person concerned obligations as to the carrying on of any activities or the safeguarding of any assets<sup>15</sup>;
- (c) provide for the carrying on of any activities or the safeguarding of any assets either by the appointment of a person to conduct or supervise the conduct of any activities (on such terms and with such powers as may be specified or described in the order) or in any other manner<sup>16</sup>;
- (d) do anything which may be done by virtue of the specified<sup>17</sup> statutory provision<sup>18</sup>.

Such an order<sup>19</sup>:

- (i) comes into force at such time as is determined by or under the order<sup>20</sup>; and
- (ii) may be varied or revoked by another order<sup>21</sup>;

and the relevant authority must, as soon as reasonably practicable, consider any representations received by the relevant authority in relation to varying or revoking such an order<sup>22</sup>.

If it has not previously ceased to be in force, an order under these provisions ceases to be in force when the market investigation reference is finally determined<sup>23</sup>.

1     Ie the Enterprise Act 2002 s 158(2): see the text and notes 11-18.

2     As to the meaning of 'market investigation reference' see PARA 276 note 3

3     Enterprise Act 2002 s 158(1)(a). As to the making of market investigation references see PARA 276 et seq.

4     Ie under the Enterprise Act 2002 s 136: see PARA 281. As to the meaning of 'publish' see PARA 280 note 7. As to the requirement to publish information see PARA 311.

5     Ie the period permitted by the Enterprise Act 2002 s 137: see PARA 281.

6     Ie under the Enterprise Act 2002 s 142: see PARA 286.

7     Ie under the Enterprise Act 2002 s 143(3): see PARA 287. As to the Secretary of State see PARA 5.

8     Ie the period permitted by the Enterprise Act 2002 s 144: see PARA 288.

9     Enterprise Act 2002 s 158(1)(b).

10    Enterprise Act 2002 s 158(1)(c). As to when a market investigation reference is finally determined see s 183(3)-(6); and PARA 276.

11    As to the meaning of 'relevant authority' see PARA 299 note 1.

12    If the order is made by the Secretary of State, it is subject to annulment in pursuance of a resolution of either House of Parliament: s 181(4). As to the making of orders under Pt 4 (ss 131-184) see further PARA 318.

13    As to the meaning of 'pre-emptive action' see PARA 299 note 2.

14 Enterprise Act 2002 s 158(2)(a).

15 Enterprise Act 2002 s 158(2)(b).

16 Enterprise Act 2002 s 158(2)(c).

17 le by virtue of the Enterprise Act 2002 Sch 8 para 19. An order may (1) require any person to supply information to the relevant authority; (2) where the Office of Fair Trading (the 'OFT') is not the relevant authority, require any person to supply information to the OFT; (3) provide for the publication, by the person who has received information by virtue of head (1) or head (2) above, of that information: Sch 8 para 19. As to the OFT see PARAS 6-8.

18 Enterprise Act 2002 s 158(2)(d); and see note 17.

19 le an order under the Enterprise Act 2002 s 158. The following enactments in Pt 3 (ss 22-130) (see PARA 172 et seq) apply in relation to orders under s 158 as they apply in relation to enforcement orders under Pt 3: (1) s 86(1)-(5) (enforcement orders; general provisions: see PARA 232); and (2) s 87 (power of directions conferred by enforcement order: see PARA 240): see s 164(2).

20 Enterprise Act 2002 s 158(3)(a).

21 Enterprise Act 2002 s 158(3)(b).

22 Enterprise Act 2002 s 158(5).

23 Enterprise Act 2002 s 158(4). As to when a market investigation reference is finally determined see s 183(3)-(6); and PARA 276.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/301. Final undertakings.

### **301. Final undertakings.**

The Competition Commission<sup>1</sup> may, in accordance with its duty to remedy adverse effects on competition<sup>2</sup>, accept, from such persons as it considers appropriate, undertakings to take action<sup>3</sup> specified or described in the undertakings<sup>4</sup>. Such an undertaking may be varied or superseded by another such undertaking<sup>5</sup>.

The Secretary of State<sup>6</sup> may, in accordance with his power to take remedial action<sup>7</sup>, accept, from such persons as he considers appropriate, undertakings to take action specified or described in the undertakings<sup>8</sup>; and such an undertaking may also be varied or superseded by another such undertaking<sup>9</sup>.

An undertaking under the above provisions comes into force when accepted<sup>10</sup>.

An undertaking accepted by the Commission<sup>11</sup> may be released by the Commission and an undertaking accepted by the Secretary of State<sup>12</sup> may be released by the Secretary of State<sup>13</sup>. The Commission or, as the case may be, the Secretary of State must, as soon as reasonably practicable, consider any representations received by it or by him in relation to varying or releasing such an undertaking<sup>14</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 le in accordance with the Enterprise Act 2002 s 138: see PARA 282.

3 As to the meaning of 'action' and 'taking action' see PARA 276 note 7.

- 4 Enterprise Act 2002 s 159(1). As to the requirement to publish information see PARA 311.
- 5 Enterprise Act 2002 s 159(4).
- 6 As to the Secretary of State see PARA 5.
- 7 le in accordance with the Enterprise Act 2002 s 147: see PARA 291.
- 8 Enterprise Act 2002 s 159(2).
- 9 Enterprise Act 2002 s 159(4). As to the requirement to publish information see PARA 311.
- 10 Enterprise Act 2002 s 159(3). The provision which may be contained in such an undertaking is not limited to the provision which is permitted by Sch 8 (paras 1-23) (provision that may be contained in certain enforcement orders: see PARA 232 et seq): s 164(1). Schedule 10 (procedural requirements for certain undertakings and orders: see PARA 241), other than Sch 10 para 9, applies in relation to undertakings under s 159 as it applies in relation to undertakings under s 82 (see PARA 225): s 165.
- 11 le an undertaking under the Enterprise Act 2002 s 159(1): see the text and notes 1-4.
- 12 le an undertaking under the Enterprise Act 2002 s 159(2): see the text and notes 6-8.
- 13 Enterprise Act 2002 s 159(5).
- 14 Enterprise Act 2002 s 159(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/302. Order-making power where final undertakings not fulfilled.

### **302. Order-making power where final undertakings not fulfilled.**

The relevant authority<sup>1</sup> may, for any of the statutory purposes<sup>2</sup>, make an order<sup>3</sup> under the following provisions<sup>4</sup> where that authority considers that:

- (1) a final undertaking accepted by the relevant authority<sup>5</sup> has not been, is not being or will not be fulfilled<sup>6</sup>; or
- (2) in relation to such an undertaking accepted by the relevant authority, information which was false or misleading in a material respect was given to the relevant authority or to the Office of Fair Trading (the 'OFT')<sup>7</sup> by the person giving the undertaking before the relevant authority decided to accept the undertaking<sup>8</sup>.

Such an order may contain anything permitted by Schedule 8 to the Enterprise Act 2002<sup>9</sup> and such supplementary, consequential or incidental provision as the relevant authority considers appropriate<sup>10</sup>. The order, or any explanatory material accompanying the order, must state:

- (a) the actions<sup>11</sup> that the persons or description of persons to whom the order is addressed must do or, as the case may be, refrain from doing<sup>12</sup>;
- (b) the date on which the order comes into force<sup>13</sup>;
- (c) the possible consequences of not complying with the order<sup>14</sup>; and
- (d) the provision of Part 4 of the Enterprise Act 2002<sup>15</sup> under which a review can be sought in relation to the order<sup>16</sup>.

Such an order:



- (i) comes into force at such time as is determined by or under the order<sup>17</sup>;
- (ii) may contain provision which is different from the provision contained in the undertaking concerned<sup>18</sup>; and
- (iii) may be varied or revoked by another order<sup>19</sup>;

but no order must be varied or revoked under these provisions unless the Office of Fair Trading (the 'OFT')<sup>20</sup> advises that such a variation or revocation is appropriate by reason of a change of circumstances<sup>21</sup>.

1 For these purposes, 'relevant authority' means (1) in the case of an undertaking accepted under the Enterprise Act 2002 s 159 (see PARA 301) by the Competition Commission, the Commission; and (2) in the case of an undertaking accepted under s 159 by the Secretary of State, the Secretary of State: s 160(7). As to the Commission see PARAS 9-12; and as to the Secretary of State see PARA 5.

2 Ie for any of the purposes mentioned in the Enterprise Act 2002 s 138(2) (see PARA 282) or (as the case may be) s 147(2) (see PARA 291): s 160(2).

3 If the order is made by the Secretary of State, it is subject to annulment in pursuance of a resolution of either House of Parliament: s 181(4). As to the making of orders under Pt 4 (ss 131-184) see further PARA 318.

4 Enterprise Act 2002 s 160(2). Section 138(3)-(6) (see PARA 282) or (as the case may be) s 147(3)-(6) (see PARA 291) applies for the purposes of s 160(2) above as it applies for the purposes of s 138 or s 147: s 160(3).

5 Ie an undertaking accepted under the Enterprise Act 2002 s 159: see PARA 301.

6 See the Enterprise Act 2002 s 160(1)(a).

7 As to the OFT see PARAS 6-8.

8 Enterprise Act 2002 s 160(1)(b).

9 Ie anything permitted by the Enterprise Act 2002 Sch 8 (paras 1-23) (provision that may be contained in certain enforcement orders): see PARA 232 et seq.

10 Enterprise Act 2002 s 160(4). The following enactments in Pt 3 (ss 22-130) (see PARA 172 et seq) apply in relation to orders under s 160 as they apply in relation to enforcement orders under Pt 3: (1) s 86(1)-(5) (enforcement orders; general provisions: see PARA 232); and (2) s 87 (power of directions conferred by enforcement order: see PARA 240): see s 164(2).

Schedule 10 (procedural requirements for certain undertakings and orders: see PARA 241), other than Sch 10 para 9, applies in relation to orders under s 160 as it applies in relation to orders under s 83 (see PARA 225) or s 84 (see PARA 226): s 165.

11 As to the meanings of 'action' and 'taking action' see PARA 276 note 7.

12 Enterprise Act 2002 s 164(3)(a).

13 Enterprise Act 2002 s 164(3)(b).

14 Enterprise Act 2002 s 164(3)(c).

15 Ie the provision of the Enterprise Act 2002 Pt 4 (ss 131-184): see PARAS 276 et seq, 303 et seq.

16 Enterprise Act 2002 s 164(3)(d). As to the review of decisions under Pt 4 see s 179; and PARA 316.

17 Enterprise Act 2002 s 160(5)(a).

18 Enterprise Act 2002 s 160(5)(b).

19 Enterprise Act 2002 s 160(5)(c).

20 As to the OFT see PARAS 6-8.

21 Enterprise Act 2002 s 160(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/A. UNDERTAKINGS AND ORDERS/303. Final orders.

### **303. Final orders.**

The Competition Commission<sup>1</sup> may, in accordance with its duty to remedy adverse effects on competition<sup>2</sup>, make an order under these provisions<sup>3</sup>. The Secretary of State<sup>4</sup> may also, in accordance with his power to take remedial action<sup>5</sup>, make an order<sup>6</sup> under these provisions<sup>7</sup>.

Such an order may contain anything permitted by Schedule 8 to the Enterprise Act 2002<sup>8</sup> and such supplementary, consequential or incidental provision as the person making it considers appropriate<sup>9</sup>. The order, or any explanatory material accompanying the order, must state:

- (1) the actions<sup>10</sup> that the persons or description of persons to whom the order is addressed must do or, as the case may be, refrain from doing<sup>11</sup>;
- (2) the date on which the order comes into force<sup>12</sup>;
- (3) the possible consequences of not complying with the order<sup>13</sup>; and
- (4) the provision of Part 4 of the Enterprise Act 2002<sup>14</sup> under which a review can be sought in relation to the order<sup>15</sup>.

Such an order comes into force at such time as is determined by or under the order<sup>16</sup> and may be varied or revoked by another order<sup>17</sup>; but no order must be varied or revoked under these provisions unless the Office of Fair Trading (the 'OFT')<sup>18</sup> advises that such a variation or revocation is appropriate by reason of a change of circumstances<sup>19</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 Ie in accordance with the Enterprise Act 2002 s 138: see PARA 282.

3 Enterprise Act 2002 s 161(1). As to the requirement to publish information see PARA 311.

4 As to the Secretary of State see PARA 5.

5 Ie in accordance with the Enterprise Act 2002 s 147: see PARA 291.

6 If the order is made by the Secretary of State, it is subject to annulment in pursuance of a resolution of either House of Parliament: s 181(4). As to the making of orders under Pt 4 (ss 131-184) see further PARA 318.

7 Enterprise Act 2002 s 161(2). As to the requirement to publish information see PARA 311.

8 Ie anything permitted by the Enterprise Act 2002 Sch 8 (paras 1-23) (provision that may be contained in certain enforcement orders): see PARA 232 et seq.

9 Enterprise Act 2002 s 161(3). The following enactments in Pt 3 (ss 22-130) (see PARA 172 et seq) apply in relation to orders under s 161 as they apply in relation to enforcement orders under Pt 3: (1) s 86(1)-(5) (enforcement orders; general provisions: see PARA 232); and (2) s 87 (power of directions conferred by enforcement order: see PARA 240): see s 164(2).

Schedule 10 (procedural requirements for certain undertakings and orders: see PARA 241), other than Sch 10 para 9, applies in relation to orders under s 161 as it applies in relation to orders under s 83 (see PARA 225) or s 84 (see PARA 226): s 165.

10 As to the meanings of 'action' and 'taking action' see PARA 276 note 7.

11 Enterprise Act 2002 s 164(3)(a).

- 12      Enterprise Act 2002 s 164(3)(b).
- 13      Enterprise Act 2002 s 164(3)(c).
- 14      le the provision of the Enterprise Act 2002 Pt 4 (ss 131-184): see PARAS 276 et seq, 304 et seq.
- 15      Enterprise Act 2002 s 164(3)(d). As to the review of decisions under Pt 4 see s 179; and PARA 316.
- 16      Enterprise Act 2002 s 161(4)(a).
- 17      Enterprise Act 2002 s 161(4)(b).
- 18      As to the OFT see PARAS 6-8.
- 19      Enterprise Act 2002 s 161(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/B. ENFORCEMENT FUNCTIONS OF THE OFFICE OF FAIR TRADING/304. Duty of the Office of Fair Trading to monitor enforcement undertakings and orders.

## ***B. ENFORCEMENT FUNCTIONS OF THE OFFICE OF FAIR TRADING***

### **304. Duty of the Office of Fair Trading to monitor enforcement undertakings and orders.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> must keep under review the carrying out of any enforcement undertaking<sup>2</sup> or any enforcement order<sup>3</sup>. The OFT must, in particular, from time to time consider:

- (1) whether an enforcement undertaking or enforcement order has been or is being complied with<sup>4</sup>;
- (2) whether, by reason of any change of circumstances, an enforcement undertaking is no longer appropriate and either one or more of the parties to it can be released from it or it needs to be varied or to be superseded by a new enforcement undertaking<sup>5</sup>; and
- (3) whether, by reason of any change of circumstances, an enforcement order is no longer appropriate and needs to be varied or revoked<sup>6</sup>.

The OFT must give the Competition Commission<sup>7</sup> or, as the case may be, the Secretary of State<sup>8</sup> such advice as it considers appropriate in relation to:

- (a) any possible variation or release by the Commission or by the Secretary of State of an enforcement undertaking accepted by it or by him<sup>9</sup>;
- (b) any possible new enforcement undertaking to be accepted by the Commission or by the Secretary of State so as to supersede another enforcement undertaking given to the Commission or to the Secretary of State<sup>10</sup>;
- (c) any possible variation or revocation by the Commission or by the Secretary of State of an enforcement order made by the Commission or by the Secretary of State<sup>11</sup>;
- (d) any possible enforcement undertaking to be accepted by the Commission or by the Secretary of State instead of an enforcement order or any possible

enforcement order to be made by the Commission or by the Secretary of State instead of an enforcement undertaking<sup>12</sup>; or

(e) the enforcement<sup>13</sup> of any enforcement undertaking or enforcement order<sup>14</sup>.

The OFT must take such action<sup>15</sup> as it considers appropriate in relation to:

(i) any possible variation or release by it of an undertaking in lieu of a market investigation reference accepted<sup>16</sup> by it<sup>17</sup>;

(ii) any possible new undertaking such as is mentioned in head (i) above to be accepted by it<sup>18</sup> so as to supersede another such undertaking given<sup>19</sup> to it<sup>20</sup>;

(iii) the enforcement by it<sup>21</sup> of any enforcement undertaking or enforcement order<sup>22</sup>.

The OFT must keep under review the effectiveness of enforcement undertakings accepted under Part 4 of the Enterprise Act 2002<sup>23</sup> and enforcement orders made under that Part<sup>24</sup>; and it must, whenever requested to do so by the Secretary of State and otherwise from time to time, prepare a report of its findings<sup>25</sup>. The OFT must give any report so prepared by it to the Commission<sup>26</sup>. It must also give a copy of the report to the Secretary of State<sup>27</sup> and must publish the report<sup>28</sup>.

1 As to the OFT see PARAS 6-8.

2 In the Enterprise Act 2002 Pt 4 (ss 131-184) (see PARA 276 et seq; the text and notes 3-28; and PARA 305 et seq), 'enforcement undertaking' means an undertaking accepted under s 154 (see PARA 296), s 157 (see PARA 299) or s 159 (see PARA 301): s 162(8).

3 Enterprise Act 2002 s 162(1). In Pt 4, 'enforcement order' means an order made under s 158 (see PARA 300), s 160 (see PARA 302) or s 161 (see PARA 303): s 162(8).

4 Enterprise Act 2002 s 162(2)(a).

5 Enterprise Act 2002 s 162(2)(b).

6 Enterprise Act 2002 s 162(2)(c).

7 As to the Competition Commission see PARAS 9-12.

8 As to the Secretary of State see PARA 5.

9 Enterprise Act 2002 s 162(3)(a).

10 Enterprise Act 2002 s 162(3)(b).

11 Enterprise Act 2002 s 162(3)(c).

12 Enterprise Act 2002 s 162(3)(d).

13 Ie by virtue of the Enterprise Act 2002 s 167(6)-(8): see PARA 307.

14 Enterprise Act 2002 s 162(3)(e).

15 As to the meanings of 'action' and 'taking action' see PARA 276 note 7.

16 Ie an undertaking accepted by it under the Enterprise Act 2002 s 154: see PARA 296.

17 See the Enterprise Act 2002 s 162(4)(a).

18 Ie under the Enterprise Act 2002 s 154: see PARA 296.

19 See note 18.

- 20 See the Enterprise Act 2002 s 162(4)(b).
- 21 ie by virtue of the Enterprise Act 2002 s 167(6): see PARA 307.
- 22 Enterprise Act 2002 s 162(4)(c).
- 23 ie under the Enterprise Act 2002 Pt 4: see PARA 276 et seq; the text and notes 1-22; and PARA 305 et seq.
- 24 Enterprise Act 2002 s 162(5).
- 25 Enterprise Act 2002 s 162(6).
- 26 Enterprise Act 2002 s 162(7)(a).
- 27 Enterprise Act 2002 s 162(7)(b).
- 28 Enterprise Act 2002 s 162(7)(c). As to the meaning of 'publish' see PARA 280 note 7.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/B. ENFORCEMENT FUNCTIONS OF THE OFFICE OF FAIR TRADING/305. Further role of the Office of Fair Trading in relation to undertakings and orders.

### **305. Further role of the Office of Fair Trading in relation to undertakings and orders.**

Where the Competition Commission<sup>1</sup> or the Secretary of State<sup>2</sup> (the 'relevant authority') is considering whether to accept interim<sup>3</sup> or final<sup>4</sup> undertakings, as the case may be<sup>5</sup>, the relevant authority may:

- (1) require the Office of Fair Trading (the 'OFT')<sup>6</sup> to consult with such persons as the relevant authority considers appropriate with a view to discovering whether they will offer undertakings which the relevant authority would be prepared<sup>7</sup> to accept<sup>8</sup>;
- (2) require the OFT to report to the relevant authority on the outcome of the OFT's consultations within such period as the relevant authority may require<sup>9</sup>.

A report under head (2) above must, in particular, contain advice from the OFT as to whether any undertakings offered should be accepted<sup>10</sup> by the relevant authority<sup>11</sup>.

The powers conferred on the relevant authority by the above provisions are without prejudice to the power of the relevant authority to consult the persons concerned itself<sup>12</sup>.

If asked by the relevant authority for advice in relation to the taking of enforcement action<sup>13</sup>, whether or not by way of undertakings, in a particular case, the OFT must give such advice as it considers appropriate<sup>14</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 As to the Secretary of State see PARA 5.
- 3 ie undertakings under the Enterprise Act 2002 s 157: see PARA 299.
- 4 ie undertakings under the Enterprise Act 2002 s 159: see PARA 301.

- 5 See the Enterprise Act 2002 s 163(1).
- 6 As to the OFT see PARAS 6-8.
- 7 It is prepared to accept under the Enterprise Act 2002 s 157 or, as the case may be, s 159.
- 8 Enterprise Act 2002 s 163(2).
- 9 Enterprise Act 2002 s 163(3).
- 10 It is under the Enterprise Act 2002 s 157 or, as the case may be, s 159.
- 11 Enterprise Act 2002 s 163(4).
- 12 Enterprise Act 2002 s 163(5).
- 13 As to the meanings of 'action' and 'taking action' see PARA 276 note 7.
- 14 Enterprise Act 2002 s 163(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/C. GENERAL PROVISIONS/306. Register of enforcement undertakings and orders.

### ***C. GENERAL PROVISIONS***

#### **306. Register of enforcement undertakings and orders.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> must compile and maintain a register for the purposes of Part 4<sup>2</sup> of the Enterprise Act 2002<sup>3</sup>. The register must be kept in such form as the OFT considers appropriate<sup>4</sup>.

The OFT must ensure that the following matters are entered in the register:

- (1) the provisions of any enforcement undertaking<sup>5</sup> accepted by virtue of Part 4 of the 2002 Act, whether by the OFT, the Competition Commission<sup>6</sup>, the Secretary of State<sup>7</sup> or a relevant sectoral regulator<sup>8</sup>;
- (2) the provisions of any enforcement order<sup>9</sup> made by virtue of that Part, whether by the Commission, the Secretary of State or a relevant sectoral regulator<sup>10</sup>; and
- (3) the details of any variation, release or revocation of such an undertaking or order<sup>11</sup>;

but that duty does not extend to anything of which the OFT is unaware<sup>12</sup>.

The Commission, the Secretary of State and any relevant sectoral regulator must inform the OFT of any matters which are to be included in the register by virtue of heads (1) to (3) above and which relate to enforcement undertakings accepted by them or enforcement orders made by them<sup>13</sup>.

The OFT must ensure that the contents of the register are available to the public:

- (a) during, as a minimum, such hours as may be specified in an order made by the Secretary of State<sup>14</sup>; and
- (b) subject to such reasonable fees, if any, as the OFT may determine<sup>15</sup>.

If requested by any person to do so and subject to such reasonable fees, if any, as the OFT may determine, the OFT must supply the person concerned with a copy, certified to be true, of the register or of an extract from it<sup>16</sup>.

- 1 As to the OFT see PARAS 6-8.
- 2 In the Enterprise Act 2002 Pt 4 (ss 131-184): see PARA 276 et seq; the text and notes 3-16; and PARA 307 et seq.
- 3 Enterprise Act 2002 s 166(1).
- 4 Enterprise Act 2002 s 166(2).
- 5 As to the meaning of 'enforcement undertaking' see PARA 304 note 2.
- 6 As to the Competition Commission see PARAS 9-12.
- 7 As to the Secretary of State see PARA 5.
- 8 Enterprise Act 2002 s 166(3)(a). As to the meaning of 'relevant sectoral regulator' see PARA 281 note 13.
- 9 As to the meaning of 'enforcement order' see PARA 304 note 3.
- 10 Enterprise Act 2002 s 166(3)(b).
- 11 Enterprise Act 2002 s 166(3)(c).
- 12 Enterprise Act 2002 s 166(4).
- 13 Enterprise Act 2002 s 166(5).
- 14 Enterprise Act 2002 s 166(6)(a). The OFT must ensure that the contents of the register are available to the public (as a minimum) between the hours of 10.00 am and 4.00 pm on any working day: OFT Registers of Undertakings and Orders (Available Hours) Order 2003, SI 2003/1373, art 3. 'Working day' means any day which is not Saturday, Sunday, Good Friday, Christmas Day, a bank holiday in England and Wales or any other day on which the office of the OFT at which the register is available to the public is closed for business: art 2. As to the making of orders by the Secretary of State under the Enterprise Act 2002 Pt 4 see s 181; and PARA 318.
- 15 Enterprise Act 2002 s 166(6)(b).
- 16 Enterprise Act 2002 s 166(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iii) Enforcement/C. GENERAL PROVISIONS/307. Rights to enforce enforcement undertakings and orders.

### **307. Rights to enforce enforcement undertakings and orders.**

The following provisions apply to any enforcement undertaking<sup>1</sup> or enforcement order<sup>2</sup>.

Any person to whom such an undertaking or order relates has a duty to comply with it<sup>3</sup>. The duty is owed to any person who may be affected by a contravention of the undertaking or, as the case may be, of the order<sup>4</sup>; and any breach of the duty which causes such a person to sustain loss or damage is actionable by him<sup>5</sup>. In any proceedings brought under the above provision<sup>6</sup> against a person to whom an enforcement undertaking or enforcement order relates it is, however, a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid contravening the undertaking or, as the case may be, the order<sup>7</sup>.

Compliance with an enforcement undertaking or an enforcement order is also enforceable by civil proceedings brought by the Office of Fair Trading (the 'OFT')<sup>8</sup> for an injunction or for any other appropriate relief or remedy<sup>9</sup>. Compliance with an interim<sup>10</sup> or final undertaking<sup>11</sup> accepted<sup>12</sup>, or with an enforcement order<sup>13</sup>, is also enforceable by civil proceedings brought by the relevant authority<sup>14</sup> for an injunction or for any other appropriate relief or remedy<sup>15</sup>. These provisions<sup>16</sup> do not, however, prejudice any right that a person may have<sup>17</sup> to bring civil proceedings for contravention or apprehended contravention of an enforcement undertaking or an enforcement order<sup>18</sup>.

1 As to the meaning of 'enforcement undertaking' see PARA 304 note 2.

2 Enterprise Act 2002 s 167(1). As to the meaning of 'enforcement order' see PARA 304 note 3.

3 Enterprise Act 2002 s 167(2).

4 Enterprise Act 2002 s 167(3).

5 Enterprise Act 2002 s 167(4).

6 *Ie* under the Enterprise Act 2002 s 167(4); see the text and note 5.

7 Enterprise Act 2002 s 167(5).

8 As to the OFT see PARAS 6-8.

9 Enterprise Act 2002 s 167(6).

10 *Ie* an undertaking accepted under the Enterprise Act 2002 s 157: see PARA 299.

11 *Ie* an undertaking accepted under the Enterprise Act 2002 s 159: see PARA 301.

12 See notes 10-11.

13 *Ie* an order under the Enterprise Act 2002 s 158 (see PARA 300), s 160 (see PARA 302) or s 161 (see PARA 303): s 167(7).

14 For these purposes, 'relevant authority' means (1) in the case of an undertaking accepted by the Competition Commission or an order made by the Commission, the Commission; and (2) in the case of an undertaking accepted by the Secretary of State or an order made by the Secretary of State, the Secretary of State: Enterprise Act 2002 s 167(8). As to the Competition Commission see PARAS 9-12; and as to the Secretary of State see PARA 5.

15 Enterprise Act 2002 s 167(7).

16 *Ie* the Enterprise Act 2002 s 167(6)-(8): see the text and notes 8-15.

17 *Ie* by virtue of the Enterprise Act 2002 s 167(4): see the text and note 5.

18 Enterprise Act 2002 s 167(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(iv) Regulated Markets/308. Regulated markets.

#### **(iv) Regulated Markets**

##### **308. Regulated markets.**



Where the Competition Commission<sup>1</sup> or the Secretary of State<sup>2</sup> is considering for the purposes of market investigations<sup>3</sup> whether relevant action would be reasonable and practicable for the purpose of remedying, mitigating or preventing an adverse effect on competition<sup>4</sup> or any detrimental effect on customers<sup>5</sup> so far as resulting from such an effect<sup>6</sup>, then the Commission or (as the case may be) the Secretary of State, in deciding whether such action would be reasonable and practicable, must have regard to the relevant statutory functions<sup>7</sup> of the sectoral regulator<sup>8</sup> concerned<sup>9</sup>.

A relevant action is:

- (1) modifying conditions in force under Part 4 of the Airports Act 1986<sup>10</sup>;
- (2) modifying the conditions of a licence granted under the Gas Act 1986<sup>11</sup>;
- (3) modifying the conditions of a licence granted under the Electricity Act 1989<sup>12</sup>;
- (4) modifying networking arrangements<sup>13</sup>;
- (5) modifying the conditions of a company's appointment under the Water Industry Act 1991<sup>14</sup>;
- (6) modifying the conditions of a licence granted under the Water Industry Act 1991<sup>15</sup> or modifying the terms and conditions of an agreement under that Act<sup>16</sup>;
- (7) modifying the conditions of a licence or infrastructure agreement granted in Northern Ireland<sup>17</sup>;
- (8) modifying the conditions of a licence granted under the Railways Act 1993<sup>18</sup>;
- (9) modifying an access agreement or a franchise agreement under the Railways Act 1993<sup>19</sup>;
- (10) modifying conditions in force in relation to airports in Northern Ireland<sup>20</sup>;
- (11) modifying the conditions of a gas licence granted in Northern Ireland<sup>21</sup>;
- (12) modifying the conditions of a licence granted under the Postal Services Act 2000<sup>22</sup>;
- (13) modifying the conditions of a licence granted in respect of air traffic services under the Transport Act 2000<sup>23</sup>;
- (14) modifying the conditions of a company's appointment<sup>24</sup> in relation to water and sewerage services in Northern Ireland<sup>25</sup>.

Provision has been made for functions under the Enterprise Act 2002 Part 4 to be exercisable by various sectoral regulators<sup>26</sup>.

1 As to the Competition Commission see PARAS 9-12.

2 As to the Secretary of State see PARA 5.

3 Ie for the purposes of the Enterprise Act 2002 Pt 4 (ss 131-184) (see PARA 276 et seq).

4 As to the meaning of 'adverse effect on competition' see PARA 279.

5 As to the meaning of 'detrimental effect on customers' see PARA 279 note 8.

6 Enterprise Act 2002 s 168(1).

7 'Relevant statutory functions' means: (1) in relation to conditions in force under the Airports Act 1986 Pt 4 other than any conditions imposed or modified in pursuance of s 40(3) or (4), the duties of the Civil Aviation Authority under s 39(2), (3) (see **AIR LAW** vol 2 (2008) PARA 230); (2) in relation to any licence granted under the Gas Act 1986 ss 7, 7A, the objectives and duties of the Gas and Electricity Markets Authority under ss 4AA, 4AB(2) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 789); (3) in relation to any licence granted under the Electricity Act 1989 s 6, the objectives and duties of the Gas and Electricity Markets Authority under ss 3A, 3B(2) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1041); (4) in relation to any networking arrangements (within the meaning given by the Communications Act 2003 s 290), the duty of the Office of Communications under s 3(1) to secure the matters mentioned in s 3(2)(c) (see **TELECOMMUNICATIONS** vol 97 (2010) PARA 16); (5) in relation to a company's appointment under the Water Industry Act 1991 Pt 2 Ch 1, the duties of the Water

Services Regulation Authority under s 2 (see **WATER AND WATERWAYS** vol 100 (2009) PARA 130); (6) in relation to a licence granted under the Water Industry Act 1991 Pt 2 Ch 1A or an agreement under s 66D, the duties of the Authority under s 2 or under s 2 and s 66D (as the case may be) (see **WATER AND WATERWAYS** vol 100 (2009) PARAS 130, 341); (7) in relation to any licence granted under the Electricity (Northern Ireland) Order 1992, SI 1992/231 (NI 1), art 10, the duty of the Director General of Electricity Supply for Northern Ireland under art 6; (8) in relation to any licence granted under the Railways Act 1993 s 8, or access agreement within the meaning of s 83(1) the duties of the Office of Rail Regulation under s 4 (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 33); (9) in relation to a SNRP issued pursuant to the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2005, SR 2005/537, where none of the conditions of the SNRP relate to consumer protection, the duties of the Department for Regional Development under reg 36; (10) in relation to any franchise agreement (within the meaning given by the Railways Act 1993 s 23(3)), the duties of the Secretary of State, the Scottish Ministers and the National Assembly for Wales under s 4 (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 33); (11) in relation to conditions in force under the Airports (Northern Ireland) Order 1994, SI 1994/426 (NI 1), Pt 4 other than any conditions imposed or modified in pursuance of art 40(3) or (4), the duties of the Civil Aviation Authority under art 30(2), (3); (12) in relation to any licence granted under the Gas (Northern Ireland) Order 1996, SI 1996/275 (NI 2), art 8, the duties of the Director General of Gas for Northern Ireland under art 5; (13) in relation to any licence granted under the Postal Services Act 2000 s 11, the duties of the Postal Services Commission under ss 3, 5 (see **POST OFFICE** vol 36(2) (Reissue) PARA 24); (14) in relation to any licence granted under the Transport Act 2000 s 5, the duties of the Civil Aviation Authority under s 87 (see **AIR LAW** vol 2 (2008) PARA 172); and (15) in relation to a company's appointment under the Water and Sewerage Services (Northern Ireland) Order 2006, SI 2006/3336, Pt III Ch I, the duties of the Northern Ireland Authority for Utility Regulation under art 6: Enterprise Act 2002 s 168(4) (amended by the Communications Act 2003 s 406(1), (7), Sch 17 para 174(1), (5), Sch 19(1), the Water Act 2003 s 101(1), Sch 7 para 36(1), (3)(a), Sch 8 para 55(1), (2)(b), the Railways and Transport Safety Act 2003 s 16(5), Sch 2 para 19(u), the Railways Act 2005 s 59(1), (6), Sch 12 para 18(1), (2), Sch 13 Pt 1, the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2005, SR 2005/537, reg 1(1) and the Water and Sewerage Services (Northern Ireland) Order 2006, SI 2006/3336 (NI 21), art 308(1), Sch 12 para 46(4)).

The Secretary of State may by order modify the Enterprise Act 2002 s 168(3), (4), (5), (6) or (7): s 168(8). At the date at which this volume states the law no such order had been made.

8 For this purpose, 'sectoral regulator' means the Civil Aviation Authority, the Northern Ireland Authority for Utility Regulation, the Water Services Regulation Authority, the Gas and Electricity Markets Authority, the Office of Communications, the Postal Services Commission, the Office of Rail Regulation, the Secretary of State, the Scottish Ministers or the National Assembly for Wales: Enterprise Act 2002 s 168(5) (amended by the Communications Act 2003 s 406(1), (7), Sch 17 para 174(1), (5)(c), Sch 19(1), the Water Act 2003 s 101(1), Sch 7 Pt 2 para 36(1), (3)(b), the Railways and Transport Safety Act 2003 s 16(5), Sch 2 Pt 2 para 19(u), the Railways Act 2005 s 59(1), (6), Sch 12 paras 18(1), (3), Sch 13 Pt 1, SI 2006/3336). See note 7. As to the sectoral regulators see PARA 18 et seq.

9 Enterprise Act 2002 s 168(2). Where the Commission or the Secretary of State is considering for the purposes of the Enterprise Act 2002 whether modifying the conditions of a licence granted under the Gas Act 1986 s 7 or s 7A (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 805, 806) or the Electricity Act 1989 s 6 (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065) would be reasonable and practicable for the purpose of remedying, mitigating or preventing an adverse effect on competition or any detrimental effect on customers so far as resulting from such an effect, then the Commission or (as the case may be) the Secretary of State may, in deciding whether modifying the conditions of such a licence would be reasonable and practicable, have regard to those matters to which the Gas and Electricity Markets Authority may have regard by virtue of the Gas Act 1986 s 4AA(4) or (as the case may be) the Electricity Act 1989 s 3A(4) (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 789, 1041): Enterprise Act 2002 s 168(6), (7). See note 7.

10 le conditions in force under the Airports Act 1986 Pt 4 (ss 36-56) other than any conditions imposed or modified in pursuance of s 40(3) or (4) (see **AIR LAW** vol 2 (2008) PARA 228 et seq).

11 le granted under the Gas Act 1986 s 7 or s 7A (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARAS 805, 806).

12 le granted under the Electricity Act 1989 s 6 (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1065).

13 le within the meaning given by the Communications Act 2003 s 290 (see **TELECOMMUNICATIONS AND BROADCASTING** vol 45(1) (2005 Reissue) PARA 279).

14 le under the Water Industry Act 1991 Pt 2 Ch 1 (ss 6-17) (see **WATER AND WATERWAYS** vol 100 (2009) PARA 137 et seq).

15 le under the Water Industry Act 1991 Pt 2 Ch 1A (ss 17A-17R) (see **WATER AND WATERWAYS** vol 100 (2009) PARA 152).

- 16 le under the Water Industry Act 1991 s 66D (see **WATER AND WATERWAYS** vol 100 (2009) PARA 341).
- 17 le under the Electricity (Northern Ireland) Order 1992, SI 1992/231 (NI 1), art 10 or an SNRP issued pursuant to the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2005, SR 2005/537.
- 18 le under the Railways Act 1993 s 8 (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 83).
- 19 le within the meanings given by the Railways Act 1993 ss 23(3), 83(1) (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARAS 102, 130).
- 20 le under the Airports (Northern Ireland) Order 1994, SI 1994/426 (NI 1) Pt 4 other than any conditions imposed or modified in pursuance of art 40(3) or (4).
- 21 le under the Gas (Northern Ireland) Order 1996, SI 1996/275 (NI 2), art 8.
- 22 le under the Postal Services Act 2000 s 11 (see **POST OFFICE** vol 36(2) (Reissue) PARA 80).
- 23 le under the Transport Act 2000 s 5 (see **AIR LAW** vol 2 (2008) PARA 141).
- 24 le under the Water and Sewerage Services (Northern Ireland) Order 2006, SI 2006/3336 (NI 21), Pt III Ch I.
- 25 Enterprise Act 2002 s 168(3) (amended by the Communications Act 2003 s 406(1), (7), Sch 17 para 174(1), (5), Sch 19(1), the Water Act 2003 s 101(1), Sch 8 para 55(1), (2), the Railways Infrastructure (Access, Management and Licensing of Railway Undertakings) Regulations (Northern Ireland) 2005, SR 2005/537, reg 45, Sch 5 para 4(a), the Water and Sewerage Services (Northern Ireland) Order 2006, SI 2006/3336 (NI 21), art 308(1), Sch 12 para 46(3)). See note 7.
- 26 See the Enterprise Act 2002 s 168(9), Sch 9.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(v) Consultation, Information and Publicity/309. Duties of relevant authorities to consult.

## **(v) Consultation, Information and Publicity**

### **309. Duties of relevant authorities to consult.**

Where the relevant authority<sup>1</sup> is proposing to make a relevant decision<sup>2</sup> in a way which the relevant authority considers is likely to have a substantial impact on the interests of any person, the relevant authority must, so far as practicable<sup>3</sup>, consult that person about what is proposed before making that decision<sup>4</sup>. In consulting the person concerned, the relevant authority must, so far as practicable, give the reasons of the relevant authority for the proposed decision<sup>5</sup>.

1 'Relevant authority' means the Office of Fair Trading (the 'OFT'), the appropriate Minister or the Competition Commission: Enterprise Act 2002 s 169(6). As to the meaning of 'appropriate Minister' see PARA 277 note 1. As to the OFT see PARAS 6-8; and as to the Competition Commission see PARAS 9-12.

2 'Relevant decision' means: (1) in the case of the OFT, any decision by the OFT as to whether to make a reference under the Enterprise Act 2002 s 131 (see PARA 276) or accept undertakings under s 154 (see PARA 296) instead of making such a reference, or to vary under s 135 (see PARA 280) such a reference; (2) in the case of the appropriate Minister, any decision by the appropriate Minister as to whether to make a reference under s 132 (see PARA 277), or to vary under s 135 such a reference; and (3) in the case of the Commission, any decision on the questions mentioned in s 134 (see PARA 279) or s 141 (see PARA 285): s 169(6).

3 In considering what is practicable for these purposes, the relevant authority must, in particular, have regard to: (1) any restrictions imposed by any timetable for making the decision; and (2) any need to keep what is proposed, or the reasons for it, confidential: Enterprise Act 2002 s 169(4).

4 Enterprise Act 2002 s 169(1), (2). The duty under s 169 does not apply in relation to the making of any decision so far as particular provision is made elsewhere by virtue of Pt 4 (ss 131-184) for consultation before the making of that decision: s 169(5).

5 Enterprise Act 2002 s 169(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(v) Consultation, Information and Publicity/310. General information duties.

### **310. General information duties.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> is required to give the Competition Commission<sup>2</sup> such information in its possession as the Commission may reasonably require to enable the Commission to carry out its functions in relation to market investigations<sup>3</sup>. The OFT must also give the Commission any other assistance which the Commission may reasonably require for the purpose of assisting it in carrying out these functions and which it is within the power of the OFT to give<sup>4</sup>. The OFT must give the Commission any information in its possession which has not been requested by the Commission but which, in the opinion of the OFT, would be appropriate to give to the Commission for the purpose of assisting it in carrying out these functions<sup>5</sup>.

Similarly, the OFT and the Commission must give the Secretary of State<sup>6</sup> or the appropriate Minister<sup>7</sup> so far as he is not the Secretary of State acting alone: (1) such information in their possession as the Secretary of State or (as the case may be) the appropriate Minister concerned may by direction reasonably require to enable him to carry out his functions in relation to market investigations<sup>8</sup>; and (2) any other assistance which the Secretary of State or (as the case may be) the appropriate Minister concerned may by direction reasonably require for the purpose of assisting him in carrying out these functions and which it is within the power of the OFT or (as the case may be) the Commission to give<sup>9</sup>. The OFT is also required to give the Secretary of State or the appropriate Minister so far as he is not the Secretary of State acting alone any information in its possession which has not been requested by the Secretary of State or (as the case may be) the appropriate Minister concerned but which, in the opinion of the OFT, would be appropriate to give to the Secretary of State or (as the case may be) the appropriate Minister concerned for the purpose of assisting him in carrying out these functions<sup>10</sup>.

The Commission and the Secretary of State or (as the case may be) the appropriate Minister concerned must have regard to any such information given to it or him<sup>11</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Competition Commission see PARAS 9-12.

3 Enterprise Act 2002 s 170(1)(a). The Commission's functions in relation to market investigations are those under Pt 4 (ss 131-184) (see PARA 276 et seq).

4 Enterprise Act 2002 s 170(1)(b).

5 Enterprise Act 2002 s 170(2).

- 6 As to the Secretary of State see PARA 5.
- 7 As to the meaning of 'appropriate Minister' see PARA 277 note 1.
- 8 Ie under the Enterprise Act 2002 Pt 4 (see PARA 276 et seq).
- 9 Enterprise Act 2002 s 170(3). As to the requirement to publish information see PARA 311. Any direction given under s 170(3) must be in writing, and may be varied or revoked by a subsequent direction: s 170(6).
- 10 Enterprise Act 2002 s 170(4).
- 11 Enterprise Act 2002 s 170(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(v) Consultation, Information and Publicity/311. Advice and information.

### **311. Advice and information.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> is required to prepare and publish general advice and information about the making of market investigation references<sup>2</sup>. The OFT may at any time publish revised, or new, advice or information<sup>3</sup>.

The Competition Commission<sup>4</sup> is required to prepare and publish general advice and information about the consideration by it of market investigation references and the way in which relevant customer benefits<sup>5</sup> may affect the taking of enforcement action in relation to such references<sup>6</sup>. The Commission may at any time publish revised, or new, advice or information<sup>7</sup>.

Any such advice and information published must be prepared with a view to explaining relevant provisions of Part 4 of the Enterprise Act 2002<sup>8</sup> to persons who are likely to be affected by them, and indicating how the OFT or (as the case may be) the Commission expects such provisions to operate<sup>9</sup>. Advice and information published must include such advice and information about the effect of Community law<sup>10</sup>, and anything done under or in accordance with it, on the provisions relating to market investigation references as the OFT or (as the case may be) the Commission considers appropriate<sup>11</sup>.

Published advice or information may include advice or information about the factors which the OFT or (as the case may be) the Commission may take into account in considering whether, and if so how, to exercise a function relating to market investigation references<sup>12</sup>.

Any advice or information published by the OFT or the Commission must be published in such manner as the OFT or (as the case may be) the Commission considers appropriate<sup>13</sup>.

- 1 As to the OFT see PARAS 6-8.
- 2 Enterprise Act 2002 s 171(1). As to the meaning of 'market investigation reference' see PARA 276 note 3. Market investigation references are made by the OFT under s 131 (see PARA 276). In preparing any advice or information under this section, the OFT must consult the Competition Commission and such other persons as it considers appropriate: s 171(9).  
See the OFT publication '*Market investigation references-Guidance about the making of references under Part 4 of the Enterprise Act*' (March 2006).
- 3 Enterprise Act 2002 s 171(2).
- 4 As to the Competition Commission see PARAS 9-12.

5 As to the meaning of 'relevant customer benefit' see PARA 180.

6 Enterprise Act 2002 s 171(3). In preparing any advice or information, the Commission must consult the OFT and such other persons as it considers appropriate: s 171(10).

See the Competition Commission publication CC3 '*Market Investigation References: Competition Commission Guidelines*' (June 2003).

7 Enterprise Act 2002 s 171(4).

8 In the Enterprise Act 2002 Pt 4 (ss 131-184) (see PARA 276 et seq).

9 Enterprise Act 2002 s 171(5).

10 'Community law' means: (1) all the rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Community Treaties; and (2) all the remedies and procedures from time to time provided for by or under the Community Treaties: Enterprise Act 2002 s 171(11). As to the Community Treaties see **STATUTES** vol 44(1) (Reissue) PARA 1383. As to Community law see PARA 24 et seq.

11 Enterprise Act 2002 s 171(6).

12 Enterprise Act 2002 s 171(7).

13 Enterprise Act 2002 s 171(8).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(v) Consultation, Information and Publicity/312. Advice and information.

### **312. Advice and information.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> is required to publish: (1) any market investigation reference<sup>2</sup>; (2) any variation of a market investigation reference made by it<sup>3</sup>; (3) any decision not to proceed with a proposed undertaking mentioned in an intervention notice<sup>4</sup>; and (4) such information as it considers appropriate about any decision made by it<sup>5</sup> to bring a case to the attention of the Secretary of State in the interests of national security<sup>6</sup>.

The Competition Commission<sup>7</sup> is required to publish: (a) any decision made by it<sup>8</sup> neither to accept an undertaking<sup>9</sup> nor to make a final order<sup>10</sup>; (b) any decision made by it that there has been a material change of circumstances<sup>11</sup> or there is another special reason<sup>12</sup>; (c) any termination of an investigation by it on the grounds that a public interest consideration is not finalised<sup>13</sup>; (d) such information as it considers appropriate about any decision made by it on the grounds of national security<sup>14</sup> to bring a case to the attention of the Secretary of State; (e) any enforcement undertaking accepted by it<sup>15</sup>; (f) any enforcement order made by it<sup>16</sup>; and (g) any variation, release or revocation of such an undertaking or order<sup>17</sup>.

The Secretary of State<sup>18</sup> is required to publish: (i) any market investigation reference made by him<sup>19</sup>; (ii) any variation of a market investigation reference made by him<sup>20</sup>; (iii) any intervention notice given by him; (iv) any decision made by him to revoke such a notice; (v) any decision made by him<sup>21</sup> neither to accept an undertaking<sup>22</sup> nor to make an order<sup>23</sup>; (vi) any enforcement undertaking accepted by him<sup>24</sup>; (vii) any variation or release of such an undertaking; and (viii) any direction given by him<sup>25</sup> in connection with the exercise by him of his functions to make a reference<sup>26</sup> to the Commission<sup>27</sup>.

The appropriate Minister<sup>28</sup> (other than the Secretary of State acting alone) is required to publish: (A) any market investigation reference made by him<sup>29</sup>; (B) any variation of a market investigation reference made by him<sup>30</sup>; and (C) any direction for the provision of information

given by him<sup>31</sup> in connection with the exercise by him of his functions to make a reference<sup>32</sup> to the Commission<sup>33</sup>.

Where any of the above persons is under an obligation to publish the result of any action taken by that person or any decision made by that person, the person concerned must also publish that person's reasons for the action concerned or (as the case may be) the decision concerned<sup>34</sup>.

The Secretary of State must also publish his reasons for any decision made by him as to the relevance of a public interest consideration<sup>35</sup> or any decision to make an order specifying considerations of national security<sup>36</sup> or to vary or revoke such an order<sup>37</sup>.

Where the Secretary of State has decided<sup>38</sup> to accept an undertaking<sup>39</sup> or to make an order<sup>40</sup>, after the acceptance of the undertaking or (as the case may be) the making of the order, he must lay details of his decision and his reasons for it, and the Commission's report<sup>41</sup>, before each House of Parliament<sup>42</sup>.

- 1 As to the OFT see PARAS 6-8.
- 2 I.e. a reference made by the OFT under the Enterprise Act 2002 s 131 (see PARA 276).
- 3 I.e. under the Enterprise Act 2002 s 135 (see PARA 280).
- 4 I.e. a decision of a kind mentioned in the Enterprise Act 2002 s 149(5)(b) (see PARA 293).
- 5 I.e. under the Enterprise Act 2002 s 152(1) (see PARA 295).
- 6 Enterprise Act 2002 s 172(1). As to the Secretary of State see PARA 5.
- 7 As to the Competition Commission see PARAS 9-12.
- 8 I.e. under the Enterprise Act 2002 s 138(2) (see PARA 282).
- 9 I.e. under the Enterprise Act 2002 s 159 (see PARA 301).
- 10 I.e. under the Enterprise Act 2002 s 161 (see PARA 303).
- 11 I.e. as mentioned in the Enterprise Act 2002 s 138(3) (see PARA 282).
- 12 I.e. as mentioned in the Enterprise Act 2002 s 138 (see PARA 282).
- 13 I.e. under the Enterprise Act 2002 s 145(1) (see PARA 289).
- 14 I.e. under the Enterprise Act 2002 s 152(2) (see PARA 295).
- 15 I.e. under the Enterprise Act 2002 s 157 (see PARA 299).
- 16 I.e. under the Enterprise Act 2002 s 158 (see PARA 300).
- 17 Enterprise Act 2002 s 172(2).
- 18 As to the Secretary of State see PARA 5.
- 19 I.e. under the Enterprise Act 2002 s 132 (see PARA 277).
- 20 I.e. under the Enterprise Act 2002 s 135 (see PARA 280).
- 21 I.e. under the Enterprise Act 2002 s 147(2) (see PARA 291).
- 22 I.e. under the Enterprise Act 2002 s 159 (see PARA 301).
- 23 I.e. under the Enterprise Act 2002 s 161 (see PARA 303).
- 24 I.e. under the Enterprise Act 2002 s 157 (see PARA 299).

- 25      le under the Enterprise Act 2002 s 170(3) (see PARA 310).
- 26      le under the Enterprise Act 2002 s 132(3) (see PARA 277).
- 27      Enterprise Act 2002 s 172(3).
- 28      As to the meaning of 'appropriate Minister' see PARA 277 note 1.
- 29      le under the Enterprise Act 2002 s 132 (see PARA 277).
- 30      le under the Enterprise Act 2002 s 135 (see PARA 280).
- 31      le under the Enterprise Act 2002 s 170(3) (see PARA 310).
- 32      le under the Enterprise Act 2002 s 132(3) (see PARA 277).
- 33      Enterprise Act 2002 s 172(4).
- 34      Enterprise Act 2002 s 172(5). Such reasons need not, if it is not reasonably practicable to do so, be published at the same time as the result of the action concerned or (as the case may be) as the decision concerned: s 172(6). The provisions of s 172(5), (6) do not apply in relation to any case falling within head (4) or head (d) in the text: s 172(7).
- 35      le under the Enterprise Act 2002 s 146(2) (see PARA 290).
- 36      le under the Enterprise Act 2002 s 153(3) (see PARA 295).
- 37      Enterprise Act 2002 s 172(8). Such reasons may be published after the publication of the decision concerned, or the making of the order or of the variation or revocation, if it is not reasonably practicable to publish them at the same time as the publication of the decision or (as the case may be) the making of the order or variation or revocation: s 172(9).
- 38      le under the Enterprise Act 2002 s 147(2) (see PARA 291).
- 39      le under the Enterprise Act 2002 s 159 (see PARA 301).
- 40      le under the Enterprise Act 2002 s 161 (see PARA 303).
- 41      le under the Enterprise Act 2002 s 142 (see PARA 286).
- 42      Enterprise Act 2002 s 172(10).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(v) Consultation, Information and Publicity/313. Defamation.

### **313. Defamation.**

For the purposes of the law relating to defamation<sup>1</sup>, absolute privilege attaches to any advice, guidance, notice or direction given, or decision or report made, by the Office of Fair Trading (the 'OFT')<sup>2</sup>, by the Secretary of State<sup>3</sup>, by the appropriate Minister<sup>4</sup> (other than the Secretary of State acting alone) or by the Competition Commission<sup>5</sup> in the exercise of any of their functions relating to market investigations<sup>6</sup>.

1      As to the law relating to defamation see **LIBEL AND SLANDER** vol 28 (Reissue) PARA 1 et seq.

2      As to the OFT see PARAS 6-8.

3      As to the Secretary of State see PARA 5.



4 As to the meaning of 'appropriate Minister' see PARA 277 note 1.

5 As to the Competition Commission see PARAS 9-12.

6 Enterprise Act 2002 s 173. Functions relating to market investigations are those under Pt 4 (ss 131-184) (see PARA 276 et seq).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(vi) Investigation Powers/314. Investigation powers of the Office of Fair Trading.

## **(vi) Investigation Powers**

### **314. Investigation powers of the Office of Fair Trading.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may exercise any of the following investigation powers for the purpose of assisting it in deciding whether to make a market investigation reference<sup>2</sup> or to accept undertakings<sup>3</sup> instead of making such a reference<sup>4</sup>. However, the OFT must not exercise any of the following powers for the purpose of assisting it as mentioned above unless it already believes that it has power to make such a reference<sup>5</sup>.

In exercise of its investigation powers, the OFT may give notice<sup>6</sup> to any person requiring him to attend at a time and place specified in the notice and to give evidence to the OFT or a person nominated by the OFT for the purpose<sup>7</sup>. The OFT may also give notice to any person requiring him to produce at a time and place so specified and to a person so specified any documents which are specified or described in the notice, or fall within a category of document which is specified or described in the notice and are in that person's custody or under his control<sup>8</sup>. The OFT may give notice to any person who carries on any business<sup>9</sup> requiring him to supply at a time and place, and in a form and manner, so specified and to a person so specified such estimates, forecasts, returns or other information as may be specified or described in the notice<sup>10</sup>.

The person to whom any document is produced in accordance with a notice may copy the document so produced, for the purpose of assisting the OFT in deciding whether to make a market investigation reference or to accept undertakings instead of making such a reference<sup>11</sup>.

No person is required: (1) to give any evidence or produce any documents which he could not be compelled to give or produce in civil proceedings before the High Court; or (2) to supply any information which he could not be compelled to supply in evidence in such proceedings<sup>12</sup>. In addition, no person may be required, in compliance with a notice under the above provisions, to go more than 10 miles from his place of residence unless his necessary travelling expenses are paid or offered to him<sup>13</sup>.

A person commits an offence if he, intentionally and without reasonable excuse, fails to comply with any requirement of such a notice or if he intentionally and without reasonable excuse alters, suppresses or destroys any document which he has been required to produce by such a notice<sup>14</sup>. A person also commits an offence if he intentionally obstructs or delays the OFT in the exercise of its investigation powers<sup>15</sup> or any person empowered to copy documents<sup>16</sup>.

1 As to the OFT see PARAS 6-8.

2 ie a reference under the Enterprise Act 2002 s 131 (see PARA 276).

3 ie under the Enterprise Act 2002 s 154 (see PARA 296).

- 4 Enterprise Act 2002 s 174(1).
- 5 Enterprise Act 2002 s 174(2).
- 6 A notice under the Enterprise Act 2002 s 174 must include information about the possible consequences of not complying with the notice: s 174(6). 'Notice' means notice in writing: s 183(1).
- 7 Enterprise Act 2002 s 174(3).
- 8 Enterprise Act 2002 s 174(4). Any reference in s 174 to the production of a document includes a reference to the production of a legible and intelligible copy of information recorded otherwise than in legible form: s 174(10).
- 9 'Business' includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge: s 183(1). As to the meaning of 'goods' see PARA 276 note 3.
- 10 Enterprise Act 2002 s 174(5).
- 11 Enterprise Act 2002 s 174(7).
- 12 Enterprise Act 2002 s 174(8), (11). See **CIVIL PROCEDURE** vol 11 (2009) PARA 749 et seq.
- 13 Enterprise Act 2002 s 174(9).
- 14 Enterprise Act 2002 s 175(1), (2). A person who commits an offence under s 175(1) or (2) is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: s 175(3). As to the statutory maximum see PARA 140 note 9.
- 15 le under the Enterprise Act 2002 s 174 (see the text and notes 1-13).
- 16 Enterprise Act 2002 s 175(4). A person who commits such an offence is liable: (1) on summary conviction, to a fine not exceeding the statutory maximum; (2) on conviction on indictment, to a fine: s 175(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(vi) Investigation Powers/315. Investigation powers of the Competition Commission.

### **315. Investigation powers of the Competition Commission.**

The Competition Commission<sup>1</sup> has the same investigation powers in relation to market investigations<sup>2</sup> as it has in relation to mergers<sup>3</sup>.

- 1 As to the Competition Commission see PARAS 9-12.
- 2 le for the purposes of the Enterprise Act 2002 Pt 4 (ss 131-184) (see PARA 276 et seq).
- 3 Enterprise Act 2002 s 176(1). The provisions relating to mergers are set out in Pt 3 (ss 22-130) (see PARA 172 et seq). As to the Commission's investigation powers see s 109 (attendance of witnesses and production of documents) (see PARA 259); s 110 (enforcement of powers under s 109; general) (see PARA 260); s 111 (penalties) (see PARA 260); s 112 (penalties: main procedural requirements) (see PARA 261); s 113 (payments and interest by instalments) (see PARA 262); s 114 (appeals in relation to penalties) (see PARA 263); s 115 (recovery of penalties) (see PARA 264); and s 116 (statement of policy) (see PARA 265). As to the modification of s 110 see s 176(2); and as to the modification of s 111(5)(b)(ii) see s 176(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(vii) General Provisions/316. Review of decisions.

## **(vii) General Provisions**

### **316. Review of decisions.**

Any person aggrieved by a decision<sup>1</sup> of the Office of Fair Trading (the 'OFT')<sup>2</sup>, the appropriate Minister<sup>3</sup>, the Secretary of State<sup>4</sup> or the Competition Commission<sup>5</sup> in connection with a market investigation reference<sup>6</sup> or possible reference may apply to the Competition Appeal Tribunal<sup>7</sup> for a review of that decision<sup>8</sup>. Except in so far as a direction to the contrary is given by the Competition Appeal Tribunal, the effect of the decision is not suspended by reason of the making of the application<sup>9</sup>.

In determining such an application the Competition Appeal Tribunal is required to apply the same principles as would be applied by a court on an application for judicial review<sup>10</sup>.

The Competition Appeal Tribunal may dismiss the application or quash the whole or part of the decision to which it relates<sup>11</sup>. Where it quashes the whole or part of the decision, the Tribunal may refer the matter back to the original decision maker with a direction to reconsider and make a new decision in accordance with the ruling of the Competition Appeal Tribunal<sup>12</sup>.

An appeal lies on any point of law arising from a decision of the Competition Appeal Tribunal to the Court of Appeal<sup>13</sup>. Permission to appeal must be granted by the Tribunal or the Court of Appeal<sup>14</sup>.

1 For this purpose, 'decision': (1) does not include a decision to impose a penalty under the Enterprise Act 2002 s 110(1) or (3) as applied by s 176 (see PARA 315); but (2) includes a failure to take a decision permitted or required by Pt 4 (ss 131-184) in connection with a market investigation reference or possible reference (see PARA 276 et seq): s 179(2).

2 As to the OFT see PARAS 6-8.

3 As to the meaning of 'appropriate Minister' see PARA 277 note 1.

4 As to the Secretary of State see PARA 5.

5 As to the Competition Commission see PARAS 9-12.

6 I.e. a reference under the Enterprise Act 2002 Pt 4 (see PARA 276 et seq).

7 As to the Competition Appeal Tribunal see PARAS 13-17.

8 Enterprise Act 2002 s 179(1).

9 Enterprise Act 2002 s 179(3).

10 Enterprise Act 2002 s 179(4). As to judicial review see **JUDICIAL REVIEW** vol 61 (2010) PARA 601 et seq.

11 Enterprise Act 2002 s 179(5)(a).

12 Enterprise Act 2002 s 179(5)(b).

13 Enterprise Act 2002 s 179(6), (8).

14 Enterprise Act 2002 s 179(7).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(vii) General Provisions/317. Offences in relation to market investigations.

### **317. Offences in relation to market investigations.**

A person commits an offence if:

- (1) he supplies any information to the Office of Fair Trading (the 'OFT')<sup>1</sup>, the Competition Commission<sup>2</sup>, the Secretary of State<sup>3</sup> or the appropriate Minister<sup>4</sup> (so far as he is not the Secretary of State acting alone) in connection with any of their functions under Part 4 of the Enterprise Act 2002<sup>5</sup>;
- (2) the information is false or misleading in a material respect; and
- (3) he knows that it is false or misleading in a material respect or is reckless as to whether it is false or misleading in a material respect<sup>6</sup>.

A person also commits an offence if he: (a) supplies any information to another person which he knows to be false or misleading in a material respect; or (b) recklessly supplies any information to another person which is false or misleading in a material respect, knowing that the information is to be used for the purpose of supplying information to the OFT, the Commission, the Secretary of State or the appropriate Minister in connection with any of their functions under Part 4 of the Act<sup>7</sup>.

Where an offence under Part 4 of the Enterprise Act 2002 committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate or a person purporting to act in such a capacity, he as well as the body corporate commits the offence and is liable to be proceeded against and punished accordingly<sup>8</sup>.

1 As to the OFT see PARAS 6-8.

2 As to the Competition Commission see PARAS 9-12.

3 As to the Secretary of State see PARA 5.

4 As to the meaning of 'appropriate Minister' see PARA 277 note 1.

5 I.e. the Enterprise Act 2002 Pt 4 (ss 131-184) see PARA 276 et seq.

6 Enterprise Act 2002 s 117(1); applied by s 180(1), (2) (amended by the Communications Act 2003 s 289(1), Sch 16 para 26). A person who commits such an offence is liable on summary conviction, to a fine not exceeding the statutory maximum; and on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both: ss 117(3), s 180(1). As to the statutory maximum see PARA 140 note 9.

7 Enterprise Act 2002 s 117(2); applied by s 180(1). See note 6.

8 Enterprise Act 2002 s 125(1); applied by s 180(1). Where the affairs of a body corporate are managed by its members, s 125(1) applies in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate: s 125(2). See further **CORPORATIONS**. As to offences by Scottish partnerships see s 125(3), (4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(3) MARKET INVESTIGATIONS/(vii) General Provisions/318. Orders and service of documents.

### **318. Orders and service of documents.**

Any power of the Secretary of State<sup>1</sup> to make an order under Part 4 of the Enterprise Act 2002<sup>2</sup> is exercisable by statutory instrument<sup>3</sup>. Any power of the Secretary of State to make an order under Part 4 may be exercised so as to make different provision for different cases or different purposes and includes power to make such incidental, supplementary, consequential, transitory, transitional or saving provision as the Secretary of State considers appropriate<sup>4</sup>.

Certain orders made by the Secretary of State<sup>5</sup> are subject to annulment in pursuance of a resolution of either House of Parliament<sup>6</sup>, and others<sup>7</sup> require a draft to be laid before and approved by a resolution of, each House of Parliament<sup>8</sup>.

An order made by the Secretary of State in relation to national security<sup>9</sup> must be laid before Parliament after being made and ceases to have effect unless approved, within the period of 28 days beginning with the day on which it is made, by a resolution of each House of Parliament<sup>10</sup>. If an order made by the Secretary of State ceases to have effect, any modification made by it of an enactment is repealed (and the previous enactment revived) but without prejudice to the validity of anything done in connection with that modification before the order ceased to have effect and without prejudice to the making of a new order<sup>11</sup>. If an order made by the Secretary of State in relation to national security would otherwise be treated for the purposes of the standing orders of either House of Parliament as a hybrid instrument, it must proceed in that House as if it were not such an instrument<sup>12</sup>.

The requirements relating to service of documents in relation to mergers<sup>13</sup> also apply in relation to market investigations<sup>14</sup>.

1 As to the Secretary of State see PARA 5.

2 Ie the Enterprise Act 2002 Pt 4 (ss 131-184) (see PARA 276 et seq).

3 Enterprise Act 2002 s 181(1). References to an order made under Pt 4 include references to an order made under s 111(4) or (6) (see PARA 260) or s 114(3)(b) or (4)(b) (see PARA 263) as applied by s 176 (see PARA 315) and an order made under s 128(6) as applied by s 183(2): s 181(10). The provisions of s 127(1)(b), (4)-(6) (see PARA 176) and s 128 (see PARA 172 note 5) apply for the purposes of Pt 4 as they apply for the purposes of Pt 3 (ss 22-130) (see PARA 172 et seq): s 183(2).

4 Enterprise Act 2002 s 181(2). The power of the Secretary of State under s 136(9) (see PARA 281), s 137(3) (see PARA 281), s 144(2) (see PARA 288), s 153(3) (see PARA 295) or s 168(8) (see PARA 308) as extended by s 181(2) may be exercised by modifying any enactment comprised in or made under the Enterprise Act 2002, or any other enactment: s 181(3).

5 Ie orders made under the Enterprise Act 2002 s 137(3) (see PARA 281), s 144(2) (see PARA 288), s 158 (see PARA 300), s 160 (see PARA 302) or s 161 (see PARA 303), or under s 111(4) or (6) (see PARA 260) or s 114(3)(b) or (4)(b) (see PARA 263) as applied by s 176 (see PARA 315).

6 Enterprise Act 2002 s 181(4).

7 Ie the Enterprise Act 2002 s 136(9) (see PARA 281) or s 168(8) (see PARA 308), or s 128(6) (see PARA 172) as applied by s 183(2) (see note 3).

8 Enterprise Act 2002 s 181(5).

9 Ie under the Enterprise Act 2002 s 153(3) (see PARA 295).

10 Enterprise Act 2002 s 181(6). In calculating the period of 28 days mentioned in s 181(6), no account is to be taken of any time during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than four days: s 181(7).

- 11 Enterprise Act 2002 s 181(8).
- 12 Enterprise Act 2002 s 181(9). As to hybrid instruments see **PARLIAMENT** vol 34 (Reissue) PARA 946.
- 13 le the Enterprise Act 2002 s 126 (see PARA 275).
- 14 Enterprise Act 2002 s 182. The provisions relating to market investigations are contained in Pt 4 (ss 131-184) (see PARA 276 et seq).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(4) CARTEL OFFENCE/(i) In general/319. Meaning of cartel offence.

## **(4) CARTEL OFFENCE**

### **(i) In general**

#### **319. Meaning of cartel offence.**

An individual is guilty of an offence<sup>1</sup> if he dishonestly agrees with one or more other persons to make or implement, or to cause to be made or implemented, arrangements of the following kind relating to at least two undertakings<sup>2</sup> (A and B)<sup>3</sup>. The arrangements must be ones which, if operating as the parties to the agreement intend, would:

- (1) directly or indirectly fix a price for the supply<sup>4</sup> by A in the United Kingdom<sup>5</sup> (otherwise than to B) of a product or service<sup>6</sup>;
- (2) limit or prevent supply by A in the United Kingdom of a product or service<sup>7</sup>;
- (3) limit or prevent production<sup>8</sup> by A in the United Kingdom of a product<sup>9</sup>;
- (4) divide between A and B the supply in the United Kingdom of a product or service to a customer or customers<sup>10</sup>;
- (5) divide between A and B customers for the supply in the United Kingdom of a product or service<sup>11</sup>; or
- (6) be bid-rigging arrangements<sup>12</sup>.

Unless head (4), head (5) or head (6) above applies, the arrangements must also be ones which, if operating as the parties to the agreement intend, would:

- (a) directly or indirectly fix a price for the supply<sup>13</sup> by B in the United Kingdom (otherwise than to A) of a product or service<sup>14</sup>;
- (b) limit or prevent supply by B in the United Kingdom of a product or service<sup>15</sup>;
- or
- (c) limit or prevent production<sup>16</sup> by B in the United Kingdom of a product<sup>17</sup>.

The essence of the cartel offence is the personal responsibility of an individual in arrangements that have been part of the national and international commercial framework for many years<sup>18</sup>.

1 A person guilty of such an offence is liable on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both; on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both: Enterprise Act 2002 s 190(1). As to the statutory maximum see PARA 140 note 9. The following factors are relevant to any sentence passed pursuant to ss 188, 190: (1) the gravity and nature of the offence; (2) the duration of the offence; (3) the degree of culpability of the defendant in implementing the cartel agreement; (4) his degree of culpability in enforcing that

agreement; and (5) whether the defendant's conduct was contrary to guidelines laid down in a company compliance manual. The court may regard the following mitigating factors as suggesting leniency: (a) any co-operation the defendant may have provided in respect of the inquiry; (b) whether the defendant was compelled to participate in the cartel under duress; (c) whether the offence was a first offence; and (d) any personal circumstances of the defendant: *R v Whittle* [2008] EWCA Crim 2560 at [34], (2008) Times, 27 November, [2008] All ER (D) 133 (Nov). These factors are not, however, to be regarded as exhaustive: *R v Whittle* [2008] EWCA Crim 2560 at [35], (2008) Times, 27 November, [2008] All ER (D) 133 (Nov).

As to prosecutions see s 190(2)-(4); and PARA 320; and as to investigations of cartel offences see PARA 321 et seq. *R v Whittle* [2008] EWCA Crim 2560, (2008) Times, 27 November, [2008] All ER (D) 133 (Nov) was the first prosecution to be brought under these provisions. The defendants were employed by a specialist manufacturer of marine hose and ancillary equipment. They were charged under the Enterprise Act 2002 s 188 with dishonestly agreeing to implement bid-rigging arrangements (see head (6) in the text). The cartel had consisted of all the principal manufacturers of marine hose. The defendants, who had no previous convictions, were arrested in the United States of America for breaching anti-competition laws. They made full and detailed admissions, volunteered full confessions and indicated to the authorities that, if prosecuted, they would plead guilty to a United Kingdom cartel offence. Each defendant entered into a formal plea agreement with the United States authorities in terms that, provided the defendant was sentenced in the United Kingdom to not less than the terms of imprisonment stated in the agreement, he would not be expected to return to the United States to serve any period in custody there. The defendants entered guilty pleas and returned to the United Kingdom where they pleaded guilty to a cartel offence, pursuant to s 188. The sentences imposed were of longer duration than those provided for in the agreements with the United States authorities and the defendants appealed. On appeal, shorter sentences were substituted; but the Court of Appeal, while making reference to the factors referred to in heads (1)-(5) and (a)-(c) above, emphasised that it was not offering general guidance on sentencing levels in cases of this nature: see *R v Whittle* [2008] EWCA Crim 2560 at [13], [33], (2008) Times, 27 November, [2008] All ER (D) 133 (Nov).

2 For these purposes, 'undertaking' has the same meaning as in the Competition Act 1998 Pt 1 (ss 1-60): Enterprise Act 2002 s 188(7).

3 Enterprise Act 2002 s 188(1).

4 In the Enterprise Act 2002 s 188(2)(a)-(d), (3) (see heads (1)-(4), (a)-(c) in the text), references to supply or production are to supply or production in the appropriate circumstances (as to which see s 189; and notes 6, 7, 9, 10, 14, 15, 17): s 188(4).

5 As to the meaning of 'United Kingdom' see PARA 401 note 1.

6 Enterprise Act 2002 s 188(2)(a). For s 188(2)(a), the appropriate circumstances are that A's supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by B in the United Kingdom: s 189(1).

7 Enterprise Act 2002 s 188(2)(b). For s 188(2)(b), the appropriate circumstances are that A's supply of the product or service would be at a level in the supply chain (1) at which the product or service would at the same time be supplied by B in the United Kingdom; or (2) at which supply by B in the United Kingdom of the product or service would be limited or prevented by the arrangements: s 189(2). See also note 4.

8 See note 4.

9 Enterprise Act 2002 s 188(2)(c). For s 188(2)(c), the appropriate circumstances are that A's production of the product would be at a level in the production chain (1) at which the product would at the same time be produced by B in the United Kingdom; or (2) at which production by B in the United Kingdom of the product would be limited or prevented by the arrangements: s 189(3).

10 Enterprise Act 2002 s 188(2)(d). For s 188(2)(d), the appropriate circumstances are that A's supply of the product or service would be at the same level in the supply chain as B's: s 189(4). See also note 4.

11 Enterprise Act 2002 s 188(2)(e).

12 Enterprise Act 2002 s 188(2)(f). 'Bid-rigging arrangements' are arrangements under which, in response to a request for bids for the supply of a product or service in the United Kingdom, or for the production of a product in the United Kingdom (1) A but not B may make a bid; or (2) A and B may each make a bid but, in one case or both, only a bid arrived at in accordance with the arrangements (s 188(5)); but arrangements are not bid-rigging arrangements if, under them, the person requesting bids would be informed of them at or before the time when a bid is made (s 188(6)). See *R v Whittle* [2008] EWCA Crim 2560 at [7], (2008) Times, 27 November, [2008] All ER (D) 133 (Nov).

13 See note 4.

14 Enterprise Act 2002 s 188(3)(a). For s 188(3)(a), the appropriate circumstances are that B's supply of the product or service would be at a level in the supply chain at which the product or service would at the same time be supplied by A in the United Kingdom: s 189(5).

15 Enterprise Act 2002 s 188(3)(b). For s 188(3)(b), the appropriate circumstances are that B's supply of the product or service would be at a level in the supply chain (1) at which the product or service would at the same time be supplied by A in the United Kingdom; or (2) at which supply by A in the United Kingdom of the product or service would be limited or prevented by the arrangements: s 189(6). See also note 4.

16 See note 4.

17 Enterprise Act 2002 s 188(3)(c). For s 188(3)(c), the appropriate circumstances are that B's production of the product would be at a level in the production chain (1) at which the product would at the same time be produced by A in the United Kingdom; or (2) at which production by A in the United Kingdom of the product would be limited or prevented by the arrangements: s 189(7).

18 *R v Whittle* [2008] EWCA Crim 2560 at [2], (2008) Times, 27 November, [2008] All ER (D) 133 (Nov).

## UPDATE

### 319 Meaning of cartel offence

NOTE 12--See also *R v B(I)* [2009] EWCA Crim 2575, [2010] 1 Cr App Rep 181, [2009] All ER (D) 90 (Dec).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(4) CARTEL OFFENCE/(i) In general/320. Prosecution of cartel offences.

### 320. Prosecution of cartel offences.

In England and Wales and Northern Ireland, proceedings for a cartel offence<sup>1</sup> may be instituted only by the Director of the Serious Fraud Office<sup>2</sup> or by or with the consent of the Office of Fair Trading (the 'OFT')<sup>3</sup>. No proceedings may be brought for such an offence in respect of an agreement outside the United Kingdom<sup>4</sup>, unless it has been implemented in whole or in part in the United Kingdom<sup>5</sup>.

Where, for the purpose of the investigation or prosecution of cartel offences, the OFT gives a person written notice under this provision, no proceedings for a cartel offence that falls within a description specified in the notice may be brought against that person in England and Wales or Northern Ireland except in circumstances specified in the notice<sup>6</sup>.

1 Is an offence under the Enterprise Act 2002 s 188: see PARA 319.

2 Enterprise Act 2002 s 190(2)(a). As to the Director of the Serious Fraud Office see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1067.

3 Enterprise Act 2002 s 190(2)(a). As to the OFT see PARAS 6-8.

4 As to the meaning of 'United Kingdom' see PARA 401 note 1.

5 Enterprise Act 2002 s 190(3).

6 Enterprise Act 2002 s 190(4).



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(4) CARTEL OFFENCE/(ii) Criminal Investigations by the Office of Fair Trading/321. Investigation of cartel offence.

## **(ii) Criminal Investigations by the Office of Fair Trading**

### **321. Investigation of cartel offence.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may conduct an investigation if there are reasonable grounds for suspecting that a cartel offence<sup>2</sup> has been committed<sup>3</sup>. The investigatory powers<sup>4</sup> of the OFT are exercisable, but only for the purposes of an investigation under the above provision<sup>5</sup>, in any case where it appears to the OFT that there is good reason to exercise them for the purpose of investigating the affairs, or any aspect of the affairs, of any person (the 'person under investigation')<sup>6</sup>.

- 1 As to the OFT see PARAS 6-8.
- 2 Is an offence under the Enterprise Act 2002 s 188: see PARA 319.
- 3 Enterprise Act 2002 s 192(1).
- 4 Is the OFT's powers under the Enterprise Act 2002 ss 193, 194: see PARA 322.
- 5 Is an investigation under the Enterprise Act 2002 s 192(1): see the text and notes 1-3.
- 6 Enterprise Act 2002 s 192(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(4) CARTEL OFFENCE/(ii) Criminal Investigations by the Office of Fair Trading/322. Powers of investigation.

### **322. Powers of investigation.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may by notice in writing<sup>2</sup>:

- (1) require the person under investigation<sup>3</sup>, or any other person who it has reason to believe has relevant information, to answer questions, or otherwise provide information, with respect to any matter relevant to the investigation at a specified place and either at a specified time or forthwith<sup>4</sup>;
- (2) require the person under investigation, or any other person, to produce, at a specified place and either at a specified time or forthwith, specified documents<sup>5</sup>, or documents of a specified description, which appear to the OFT to relate to any matter relevant to the investigation<sup>6</sup>.

If any such documents as are mentioned in head (2) above are produced, the OFT may:

- (a) take copies or extracts from them<sup>7</sup>;
- (b) require the person producing them to provide an explanation of any of them<sup>8</sup>;

and if any such documents are not produced, the OFT may require the person who was required to produce them to state, to the best of his knowledge and belief, where they are<sup>9</sup>.

On an application made by the OFT to the High Court<sup>10</sup> in accordance with rules of court<sup>11</sup>, a judge may issue a warrant<sup>12</sup> if he is satisfied that there are reasonable grounds for believing that there are on any premises documents which the OFT has power under the above provisions to require to be produced for the purposes of an investigation<sup>13</sup> and that:

- (i) a person has failed to comply with a requirement under those provisions to produce the documents<sup>14</sup>;
- (ii) it is not practicable to serve a notice under those provisions in relation to them<sup>15</sup>; or
- (iii) the service of such a notice in relation to them might seriously prejudice the investigation<sup>16</sup>.

Such a warrant must authorise a named officer of the OFT, and any other officers of the OFT whom the OFT has authorised in writing to accompany the named officer:

- (A) to enter the premises, using such force as is reasonably necessary for the purpose<sup>17</sup>;
- (B) to search the premises and either take possession of any documents appearing to be of the relevant kind<sup>18</sup>, or take, in relation to any documents appearing to be of the relevant kind, any other steps which may appear to be necessary for preserving them or preventing interference with them<sup>19</sup>;
- (C) to require any person to provide an explanation of any document appearing to be of the relevant kind or to state, to the best of his knowledge and belief, where it may be found<sup>20</sup>;
- (D) to require any information which is stored in any electronic form and is accessible from the premises and which the named officer considers relates to any matter relevant to the investigation, to be produced in a form in which it can be taken away, and in which it is visible and legible or from which it can readily be produced in a visible and legible form<sup>21</sup>.

Such a warrant may authorise persons specified in the warrant to accompany the named officer who is executing it<sup>22</sup>.

The warrant must:

- (aa) state the address or other identification of the premises to be subject to the warrant;
- (bb) state the names of the named officer<sup>23</sup> and of any other officers or other persons who may accompany him in executing the warrant;
- (cc) set out the action which the warrant authorises the persons executing it to take<sup>24</sup>;
- (dd) give the date on which the warrant is issued; and
- (ee) state that the named officer has given the required<sup>25</sup> undertaking<sup>26</sup>.

It must also state the name and judicial title of the person making it, bear the date on which it is given or made, and be sealed by the court<sup>27</sup>. Upon the issue of a warrant the court will provide to the OFT the sealed warrant and the notice of the powers to search premises and the rights of occupiers<sup>28</sup>, and a copy of the sealed warrant and the notice for service on the occupier or person in charge of the premises subject to the warrant<sup>29</sup>.

A named officer attending premises to execute a warrant must, if the premises are occupied, produce the warrant and notice immediately upon arrival at the premises to the occupier or any other person entitled to grant access to the premises, explaining the authority under which entry is sought<sup>30</sup>. As soon as possible after his arrival at the premises, he must personally serve a copy of the warrant and notice on the occupier or person appearing to him to be in charge of the premises<sup>31</sup>, but he is not required to serve the warrant and notice personally if he reasonably believes this would frustrate the object of the search or endanger officers or other people<sup>32</sup>. If the occupier is not present, the named officer must leave copies of the warrant and notice of the powers to search premises and of the rights of occupiers in a prominent place on the premises or appropriate part of the premises, recording the name of the named officer in charge of the search and the date and time of the search, unless the named officer reasonably believes recording or disclosing his name might put him in danger<sup>33</sup>. The named officer must also comply with any order which the court may make for service of any other documents relating to the application<sup>34</sup>. Unless the court otherwise orders, the initial production of a warrant and entry to premises under the authority of the warrant must take place at a reasonable hour, unless this might frustrate the purpose of the search<sup>35</sup>; but once persons named in the warrant have entered premises under the authority of a warrant, they may, whilst the warrant remains in force, either remain on the premises or re-enter the premises to continue executing the warrant<sup>36</sup>. If the persons executing a warrant propose to remove any items from the premises pursuant to the warrant they must, unless it is impracticable, make a list of all the items to be removed, supply a copy of the list to the occupier or person appearing to be in charge of the premises and give that person a reasonable opportunity to check the list before removing any of the items<sup>37</sup>.

The warrant will expire one month after the date on which it is issued<sup>38</sup>. Intentional obstruction of a person exercising his powers under such a warrant is an offence<sup>39</sup>.

The occupier or person in charge of premises in relation to which a warrant has been issued may apply<sup>40</sup> to vary or discharge the warrant<sup>41</sup>. Such an application to stop a warrant from being executed must be made immediately upon the warrant being served<sup>42</sup>. A person applying to vary or discharge a warrant must first inform the named officer that he is making the application<sup>43</sup>.

The OFT may authorise any competent person who is not an officer of the OFT to exercise on its behalf all or any of the powers conferred<sup>44</sup> by the statutory provisions set out above<sup>45</sup>. No such authority may be granted except for the purpose of investigating the affairs, or any aspect of the affairs, of a person specified in the authority<sup>46</sup>. No person is bound to comply with any requirement imposed by a person exercising powers by virtue of any authority so granted unless he has, if required to do so, produced evidence of his authority<sup>47</sup>.

1 As to the OFT see PARAS 6-8.

2 A notice under the Enterprise Act 2002 s 193(1) or (2) (see heads (1), (2) in the text) must indicate (1) the subject matter and purpose of the investigation; and (2) the nature of the offences created by s 201 (see PARA 325): s 193(5). As to the meaning of 'writing' see PARA 354 note 20.

3 For the purposes of the Enterprise Act 2002 ss 192-201 (see PARA 321; the text and notes 1-2, 4-10; and PARAS 323-325), 'person under investigation' has the meaning given in s 192(2) (see PARA 321): s 202.

4 Enterprise Act 2002 s 193(1). Non-compliance without reasonable excuse is an offence, as is making a false statement in this connection: see PARA 325.

5 For the purposes of the Enterprise Act 2002 ss 192-201, 'documents' includes information recorded in any form and, in relation to information recorded otherwise than in a form in which it is visible and legible, references to its production include references to producing it in a form in which it is visible and legible or from which it can readily be produced in a visible and legible form: s 202.

6 Enterprise Act 2002 s 193(2). Non-compliance without reasonable excuse is an offence, as is the deliberate falsification, concealment, destruction or disposal of relevant documents: see PARA 325.

7 Enterprise Act 2002 s 193(3)(a).

8 Enterprise Act 2002 s 193(3)(b). Non-compliance without reasonable excuse is an offence, as is making a false statement in this connection: see PARA 325.

9 Enterprise Act 2002 s 193(4). Non-compliance without reasonable excuse is an offence, as is making a false statement in this connection: see PARA 325.

10 In Scotland, the application is made by the procurator fiscal to the sheriff: see the Enterprise Act 2002 s 194(1).

11 An application by the OFT for a warrant under the Enterprise Act 2002 must be made to a High Court judge using the Part 8 procedure as modified by *Practice Direction--Application for a Warrant under the Enterprise Act 2002*: paras 1.1(6), 2.1. The application must be made to a judge of the Chancery Division at the Royal Courts of Justice: para 2.2. The application is made without notice and the claim form may be issued without naming a defendant: para 2.3. CPR 8.1(3), 8.3, 8.4, 8.5(2)-(6), 8.6(1), 8.7 and 8.8 do not apply: *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 2.3. As to the Part 8 procedure see **CIVIL PROCEDURE** vol 11 (2009) PARA 127 et seq.

The court will not serve any claim form, warrant, or other document filed or issued in such an application except in accordance with an order of the judge hearing the application: *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 3.1. CPR 5.4(2), 5.4B and 5.4C (see **CIVIL PROCEDURE** vol 11 (2009) PARA 82) do not apply, and *Practice Direction--Application for a Warrant under the Enterprise Act 2002* paras 3.3, 3.4 have effect in their place: para 3.2. When a claim form is issued the court file will be marked 'Not for disclosure' and, unless a High Court judge grants permission, the court records relating to the application (including the claim form and documents filed in support and any warrant or order that is issued) will not be made available by the court for any person to inspect or copy, either before or after the hearing of the application: para 3.3. An application for permission under para 3.3 must be made on notice to the OFT in accordance with CPR Pt 23 (see **CIVIL PROCEDURE** vol 11 (2009) PARA 303 et seq): *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 3.4. As to the contents of the claim form, affidavit and documents in support see paras 4.1-4.6; and as to listing see para 5. An application for a warrant will be heard and determined in private, unless the judge hearing it directs otherwise: para 6.1.

12 The court will not issue a warrant unless there has been filed a written undertaking, signed by the named officer, to comply with *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.1 (see the text and notes 30-32): para 6.2. In Scotland, a warrant is issued by the sheriff: see the Enterprise Act 2002 s 194(1).

13 Enterprise Act 2002 s 194(1)(a).

14 Enterprise Act 2002 s 194(1)(b)(i).

15 Enterprise Act 2002 s 194(1)(b)(ii).

16 Enterprise Act 2002 s 194(1)(b)(iii).

17 Enterprise Act 2002 s 194(2)(a).

18 Documents are of the relevant kind if they are of a kind in respect of which the application under the Enterprise Act 2002 s 194(1) was granted: s 194(3).

19 Enterprise Act 2002 s 194(2)(b). The Criminal Justice and Police Act 2001 s 50 (additional powers of seizure from premises: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 890) applies to powers of seizure conferred by the Enterprise Act 2002 s 194(2): Criminal Justice and Police Act 2001 Sch 1 para 73B (added by the Enterprise Act 2002 s 194(5)). See also the Criminal Justice and Police Act 2001 s 59, which makes provision about applications relating to property seized in the exercise of the powers conferred by (among other provisions) the Enterprise Act 2002 194(2); and **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 898.

20 Enterprise Act 2002 s 194(2)(c).

21 Enterprise Act 2002 s 194(2)(d).

22 Enterprise Act 2002 s 194(4).

23 'Officer' means an officer of the OFT; and 'named officer' means the person identified in a warrant as the principal officer or person in charge of executing that warrant: *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 1.1(3), (4). See, however, the text and notes 44-47.

- 24 le under the Enterprise Act 2002 s 194: see the text and notes 10-22.
- 25 le the undertaking required by *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 6.2: see note 12.
- 26 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 7.1.
- 27 See *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 7.2, applying CPR 40.2 (as to which see **CIVIL PROCEDURE** vol 12 (2009) PARA 1137).
- 28 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* paras 1.1(5), 7.3.(1).
- 29 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 7.3(2).
- 30 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.1(a).
- 31 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.1(b).
- 32 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.1.
- 33 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.2.
- 34 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.3.
- 35 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.4(1).
- 36 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.4(2).
- 37 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 8.5.
- 38 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 10.
- 39 See PARA 325.
- 40 The application should be made to the judge who issued the warrant, or, if he is not available, to another judge of the Chancery Division: *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 9.4.
- 41 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 9.1.
- 42 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 9.2.
- 43 *Practice Direction--Application for a Warrant under the Enterprise Act 2002* para 9.3.
- 44 le the powers conferred by the Enterprise Act 2002 s 193 or s 194: see the text and notes 1-22.
- 45 Enterprise Act 2002 s 195(1).
- 46 Enterprise Act 2002 s 195(2).
- 47 Enterprise Act 2002 s 195(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(4) CARTEL OFFENCE/(ii) Criminal Investigations by the Office of Fair Trading/323. Privileged information and use of statements.

### **323. Privileged information and use of statements.**

A person may not be required under the investigatory powers set out in the previous paragraph<sup>1</sup> to disclose any information or produce any document<sup>2</sup> which he would be entitled to

refuse to disclose or produce on grounds of legal professional privilege<sup>3</sup> in proceedings in the High Court, except that a lawyer may be required to provide the name and address of his client<sup>4</sup>. Nor may a person be required<sup>5</sup> to disclose any information or produce any document in respect of which he owes an obligation of confidence by virtue of carrying on any banking business unless:

- (1) the person to whom the obligation of confidence is owed consents to the disclosure or production; or
- (2) the Office of Fair Trading (the 'OFT')<sup>6</sup> has authorised the making of the requirement<sup>7</sup>.

A statement by a person in response to a requirement imposed by virtue of the OFT's investigatory powers<sup>8</sup> may only be used in evidence against him:

- (a) on a prosecution for an offence<sup>9</sup> in connection with making a false or misleading statement<sup>10</sup>; or
- (b) on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it<sup>11</sup>.

The statement may not, however, be used against that person by virtue of head (b) above unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person in the proceedings arising out of the prosecution<sup>12</sup>.

A statement made by a person in response to a requirement imposed by virtue of any of certain statutory powers of investigation by the OFT under the Competition Act 1998<sup>13</sup> may not be used in evidence against him on a prosecution for a cartel offence<sup>14</sup> unless, in the proceedings, in giving evidence, he makes a statement inconsistent with it and evidence relating to it is adduced, or a question relating to it is asked, by him or on his behalf<sup>15</sup>.

1     Ie under the Enterprise Act 2002 s 193 or s 194: see PARA 322.

2     As to the meaning of 'documents' see PARA 322 note 5.

3     As to legal professional privilege see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 507, 511.

4     Enterprise Act 2002 s 196(1). Section 196(1) is modified in its application to Scotland: see s 196(3).

5     See note 1.

6     As to the OFT see PARAS 6-8.

7     Enterprise Act 2002 s 196(2).

8     Ie imposed by virtue of the Enterprise Act 2002 s 193 or s 194: see PARA 322.

9     Ie an offence under the Enterprise Act 2002 s 201(2): see PARA 325.

10    Enterprise Act 2002 s 197(1)(a).

11    Enterprise Act 2002 s 197(1)(b).

12    Enterprise Act 2002 s 197(2).

13    Ie by virtue of any of the Competition Act 1998 ss 26-28: see PARAS 129-131.

14    Ie an offence under the Enterprise Act 2002 s 188: see PARA 319.

15    Competition Act 1998 s 30A (added by the Enterprise Act 2002 s 198).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(4) CARTEL OFFENCE/(ii) Criminal Investigations by the Office of Fair Trading/324. Surveillance powers and authorisation of action in respect of property.

### **324. Surveillance powers and authorisation of action in respect of property.**

The chairman of the Office of Fair Trading (the 'OFT')<sup>1</sup> has power to grant authorisations for the carrying out of intrusive surveillance under the Regulation of Investigatory Powers Act 2000<sup>2</sup>, but only if he believes that the authorisation is necessary for the purpose of preventing or detecting a cartel offence<sup>3</sup> and that the authorised surveillance is proportionate to what is sought to be achieved by carrying it out<sup>4</sup>. The chairman of the OFT must not grant an authorisation for the carrying out of intrusive surveillance except on an application made by an officer of the OFT<sup>5</sup>. If the chairman is absent and the case is urgent, the application may be made to and considered by an officer of the OFT designated by it for the statutory purposes as a person entitled so to act in an urgent case<sup>6</sup>. Except in urgent cases, the authorisation does not have effect until it has been approved by an ordinary Surveillance Commissioner<sup>7</sup>. An ordinary Surveillance Commissioner may quash an authorisation at any time if he is not satisfied that the statutory grounds for making it are satisfied<sup>8</sup>. The Chairman of the OFT may appeal to the Chief Surveillance Commissioner against such a decision<sup>9</sup>. These provisions are discussed in more detail elsewhere in this work<sup>10</sup>.

The chairman of the OFT also has power to authorise interference with property or with wireless telegraphy where he believes that such action is necessary for the purpose of preventing or detecting a cartel offence and that the taking of the action is proportionate to what the action seeks to achieve<sup>11</sup>. This power is also discussed in more detail elsewhere in this work<sup>12</sup>.

1 As to the OFT see PARAS 6-8.

2 See the Regulation of Investigatory Powers Act 2000 s 32(1), (6)(n) (s 32(6)(n) added by the Enterprise Act 2002 s 199(1), (2)(b)); and **POLICE** vol 36(1) (2007 Reissue) PARA 497. As to the meaning of 'intrusive surveillance' see **POLICE** vol 36(1) (2007 Reissue) PARA 489.

3 Is an offence under the Enterprise Act 2002 s 188: see PARA 319.

4 See the Regulation of Investigatory Powers Act 2000 s 32(2), (3), (3A) (s 32(3A) added by the Enterprise Act 2002 s 199(1), (2)(a)); and **POLICE** vol 36(1) (2007 Reissue) PARA 497.

5 See the Regulation of Investigatory Powers Act 2000 s 33(4A) (added by the Enterprise Act 2002 s 199(1), (3)); and **POLICE** vol 36(1) (2007 Reissue) PARA 499.

6 See the Regulation of Investigatory Powers Act 2000 s 34(1)-(3), (4)(m) (amended for these purposes by the Enterprise Act 2002 s 199(1), (5)); and **POLICE** vol 36(1) (2007 Reissue) PARA 500.

7 See the Regulation of Investigatory Powers Act 2000 s 36 (amended for these purposes by the Enterprise Act 2002 s 199(1), (7)); and **POLICE** vol 36(1) (2007 Reissue) PARA 502.

8 See the Regulation of Investigatory Powers Act 2000 s 37 (amended for these purposes by the Enterprise Act 2002 s 199(1), (8)); and **POLICE** vol 36(1) (2007 Reissue) PARA 503.

9 See the Regulation of Investigatory Powers Act 2000 s 38 (amended for these purposes by the Enterprise Act 2002 s 199(1), (9)); and **POLICE** vol 36(1) (2007 Reissue) PARA 504.

10 See **POLICE** vol 36(1) (2007 Reissue) PARA 489 et seq.

11 See the Police Act 1997 s 93 (amended for these purposes by the Enterprise Act 2002 s 200(2), (2)); and **POLICE** vol 36(1) (2007 Reissue) PARA 483.

12 See **POLICE** vol 36(1) (2007 Reissue) PARA 483 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(4) CARTEL OFFENCE/(ii) Criminal Investigations by the Office of Fair Trading/325. Offences in relation to investigation of cartel offences.

### **325. Offences in relation to investigation of cartel offences.**

Any person who without reasonable excuse fails to comply with a requirement imposed on him under the statutory powers of investigation<sup>1</sup> conferred on the Office of Fair Trading (the 'OFT')<sup>2</sup> is guilty of an offence<sup>3</sup>, as is a person who, in purported compliance with such a requirement, makes a statement which he knows to be false or misleading in a material particular<sup>4</sup> or recklessly makes a statement which is false or misleading in a material particular<sup>5</sup>.

Where any person:

- (1) knows or suspects that an investigation by the Serious Fraud Office<sup>6</sup> or the OFT into a cartel offence<sup>7</sup> is being or is likely to be carried out; and
- (2) falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents<sup>8</sup> which he knows or suspects are or would be relevant to such an investigation,

he is guilty of an offence unless he proves that he had no intention of concealing the facts disclosed by the documents from the persons carrying out such an investigation<sup>9</sup>.

A person who intentionally obstructs a person in the exercise of his powers under a warrant issued under the statutory powers of investigation<sup>10</sup> is also guilty of an offence<sup>11</sup>.

1 le under the Enterprise Act 2002 s 193 or s 194: see PARA 322.

2 As to the OFT see PARAS 6-8.

3 See the Enterprise Act 2002 s 201(1). A person guilty of such an offence is liable on summary conviction to imprisonment for a term not exceeding six months or to a fine not exceeding level 5 on the standard scale, or to both: s 201(1). As to the standard scale see PARA 16 note 18.

4 Enterprise Act 2002 s 201(2)(a). A person guilty of an offence under s 201(2) is liable (1) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both; and (2) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both: s 201(3). As to the statutory maximum see PARA 140 note 9.

5 Enterprise Act 2002 s 201(2)(b). As to the penalty for such an offence see note 4.

6 As to the Serious Fraud Office see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(3) (2006 Reissue) PARA 1067 et seq.

7 le an offence under the Enterprise Act 2002 s 188: see PARA 319.

8 As to the meaning of 'documents' see PARA 322 note 5.

9 Enterprise Act 2002 s 201(4). A person guilty of an offence under s 201(4) is liable (1) on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both; and (2) on summary conviction, to imprisonment for a term not exceeding six months or to a fine not exceeding the statutory maximum, or to both: s 201(5).

10 le a warrant issued under the Enterprise Act 2002 s 194: see PARA 322.



11 Enterprise Act 2002 s 201(6). A person guilty of such an offence is liable (1) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine, or to both; and (2) on summary conviction, to a fine not exceeding the statutory maximum: s 201(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/(i) Restrictions on Disclosure/326. General restriction on disclosure of specified information.

## (5) INFORMATION

### (i) Restrictions on Disclosure

#### 326. General restriction on disclosure of specified information.

The following provisions apply to specified information<sup>1</sup> which relates to:

- (1) the affairs of an individual;
- (2) any business of an undertaking<sup>2</sup>.

Such information must not be disclosed during the lifetime of the individual<sup>3</sup>, or while the undertaking continues in existence<sup>4</sup>, unless the disclosure is permitted under Part 9<sup>5</sup> of the Enterprise Act 2002<sup>6</sup>. This does not, however, prevent the disclosure of any information if the information has on an earlier occasion been disclosed to the public in circumstances which do not contravene:

- (a) the above restriction<sup>7</sup>;
- (b) any other enactment or rule of law prohibiting or restricting the disclosure of the information<sup>8</sup>.

Nothing in Part 9 of the 2002 Act authorises a disclosure of information which contravenes the Data Protection Act 1998<sup>9</sup> and nothing in that Part affects the Competition Appeal Tribunal<sup>10</sup>. Nor, with one exception<sup>11</sup>, do the provisions of that Part affect any power or duty to disclose information which exists apart from those provisions<sup>12</sup>.

1 As to the meaning of 'specified information' see PARA 327.

2 Enterprise Act 2002 s 237(1).

3 Enterprise Act 2002 s 237(2)(a).

4 Enterprise Act 2002 s 237(2)(b).

5 Ie under the Enterprise Act 2002 Pt 9 (ss 237-247): see the text and notes 1-4, 6-12; and PARA 327 et seq.

6 Enterprise Act 2002 s 237(2). A person who discloses information in contravention of s 237(2) is guilty of an offence: see PARA 335.

7 Ie the Enterprise Act 2002 s 237(2): see the text and notes 3-6.

8 Enterprise Act 2002 s 237(3).

9 Enterprise Act 2002 s 237(4). As to the Data Protection Act 1998 see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 503 et seq.

10 Enterprise Act 2002 s 237(5). As to the Competition Appeal Tribunal see PARAS 13-17.

11 le with the exception of the Enterprise Act 2002 s 244: see PARA 334.

12 See the Enterprise Act 2002 s 237(6). As to the construction of s 237(6) see *Dumfries and Galloway Council v Dunion, Scottish Information Comr* [2008] CSIH 12, 2008 SC 327, 2008 Scot (D) 8/2.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/(i) Restrictions on Disclosure/327. Specified information.

### 327. Specified information.

The following provisions apply for the purposes of Part 9<sup>1</sup> of the Enterprise Act 2002<sup>2</sup>.

Information is specified information if it comes to a public authority<sup>3</sup> in connection with the exercise of any function it has under or by virtue of:

- (1) Part 1<sup>4</sup>, Part 3<sup>5</sup>, Part 4<sup>6</sup>, Part 6<sup>7</sup>, Part 7<sup>8</sup> or Part 8<sup>9</sup> of that Act;
- (2) an enactment<sup>10</sup> specified in Schedule 14 to that Act<sup>11</sup>;
- (3) such subordinate legislation as the Secretary of State may by order<sup>12</sup> specify for these purposes<sup>13</sup>;

and it is immaterial whether information comes to a public authority before or after 7 November 2002<sup>14</sup>.

1 le the Enterprise Act 2002 Pt 9 (ss 237-247): see PARA 326; the text and notes 2-14; and PARA 328 et seq.

2 Enterprise Act 2002 s 238(8).

3 'Public authority' (except in the expression 'overseas public authority') (see PARA 333) must be construed in accordance with the Human Rights Act 1998 s 6: Enterprise Act 2002 s 238(3). For those purposes, 'public authority' includes (1) a court or tribunal; and (2) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament: Human Rights Act 1998 s 6(3). At the date at which this volume states the law, 'Parliament' in s 6(3) does not include the House of Lords in its judicial capacity: s 6(4) (repealed by the Constitutional Reform Act 2005 Sch 9 Pt I para 66(4) as from 1 October 2009; as from that date, the jurisdiction of the House of Lords to hear appeals will be transferred to the new Supreme Court established under Pt 3 (ss 23-60)). In relation to a particular act, a person is not a public authority by virtue only of the Human Rights Act 1998 s 6(3)(b) (see head (2) above) if the nature of the act is private: s 6(5). See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS**.

4 le the Enterprise Act 2002 Pt 1 (ss 1-11): see PARA 6 et seq.

5 le the Enterprise Act 2002 Pt 3 (ss 22-130): see PARA 172 et seq.

6 le the Enterprise Act 2002 Pt 4 (ss 131-184): see PARA 276 et seq.

7 le the Enterprise Act 2002 Pt 6 (ss 188-202): see PARA 319 et seq.

8 le the Enterprise Act 2002 Pt 7 (ss 203-209): see PARAS 8, 151, 171, 232 et seq.

9 le the Enterprise Act 2002 Pt 8 (ss 210-236): see PARA 339 et seq.

10 In head (2) in the text, the reference to an enactment includes a reference to an enactment contained in (1) an Act of the Scottish Parliament; (2) Northern Ireland legislation; (3) subordinate legislation: Enterprise Act 2002 s 238(4). For the purposes of Pt 9, 'subordinate legislation' has the same meaning as in the

Interpretation Act 1978 s 21(1) (ie Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act) and includes an instrument made under (a) an Act of the Scottish Parliament; (b) Northern Ireland legislation: Enterprise Act 2002 s 246.

11 The enactments so specified are: (1) the Fair Trading Act 1973 Pts I, III-VII (all repealed), Pt VIII (repealed except for s 93B) and Pt XI (ss 118-123) (pyramid selling and similar trading schemes: see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 853 et seq); (2) the Trade Descriptions Act 1968 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 471 et seq); (3) the Hallmarking Act 1973 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 765); (4) the Prices Act 1974 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 681 et seq); (5) the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 78 et seq; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 763, 768 et seq); (6) the Customs and Excise Management Act 1979 (see **CUSTOMS AND EXCISE**); (7) the Estate Agents Act 1979 (see **AGENCY** vol 1 (2008) PARA 239 et seq); (8) the Competition Act 1980 (see PARAS 3, 10, 115; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 405); (9) the Video Recordings Act 1984 (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 276 et seq); (10) the Consumer Protection Act 1987 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 518 et seq) and the corresponding Northern Ireland legislation; (11) the Copyright, Designs and Patents Act 1988 (see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; PATENTS AND REGISTERED DESIGNS**); (12) the Property Misdescriptions Act 1991 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 791 et seq); (13) the Timeshare Act 1992 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 868 et seq); (14) the Clean Air Act 1993 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 207 et seq); (15) the Value Added Tax Act 1994 (see **VALUE ADDED TAX**); (16) the Trade Marks Act 1994 (see **TRADE MARKS AND TRADE NAMES**); (17) the Competition Act 1998 (see PARA 115 et seq); (18) the Financial Services and Markets Act 2000 Pt X Ch III (ss 159-164), Pt XVIII Ch II (ss 302-310) (competition scrutiny: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 38 et seq, **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 730 et seq); (19) an order made under the Financial Services and Markets Act 2000 s 95 (competition scrutiny: see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 432); (20) the Fireworks Act 2003 (see **EXPLOSIVES**); (21) the Compensation Act 2006 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 553 et seq; and **DAMAGES; NEGLIGENCE**); and (22) the Consumers, Estate Agents and Redress Act 2007 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 444; and **AGENCY**): Enterprise Act 2002 Sch 14 (amended by the Fireworks Act 2003 s 12(3); the Consumers, Estate Agents and Redress Act 2007 s 29(1); and by SI 2003/1400; SI 2003/2580; SI 2007/2977; SI 2008/1277).

The Secretary of State may by order amend the Enterprise Act 2002 Sch 14: s 238(5). The power to make such an order includes power to add, vary or remove a reference to any provision of (a) an Act of the Scottish Parliament; (b) Northern Ireland legislation: s 238(6). An order under s 238 must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 238(7). In the exercise of this power, the Secretary of State has made the amending orders cited above. As to the Secretary of State see PARA 5.

12 As to the making of such an order see the Enterprise Act 2002 s 238(7), cited in note 11.

13 Enterprise Act 2002 s 238(1). As to the subordinate legislation specified for the purposes of s 238(1)(c) (see head (3) in the text) see the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003, SI 2003/1400, Sch 3 (amended by SI 2005/1803; SI 2007/1846; SI 2008/1277; SI 2008/1816); the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Specification) Order 2004, SI 2004/693, Sch 1 (amended by SI 2004/3201; SI 2006/3418; SI 2008/37; SI 2008/1597; SI 2008/2164); the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2007, SI 2007/2977, art 3.

14 Enterprise Act 2002 s 238(2). 7 November 2002 is the date of the passing of the Enterprise Act 2002, which received royal assent on that date.

## UPDATE

### 327 Specified information

NOTE 13--SI 2004/693 Sch 1 further amended: SI 2008/1597.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/ (ii) Permitted Disclosure/328. Disclosure with consent.

## **(ii) Permitted Disclosure**

### **328. Disclosure with consent.**

Part 9 of the Enterprise Act 2002<sup>1</sup> does not prohibit the disclosure by a public authority<sup>2</sup> of information held by it to any other person if it obtains each required consent<sup>3</sup>.

If the information was obtained by the authority from a person who had the information lawfully and the authority knows the identity of that person, the consent of that person is required<sup>4</sup>.

If the information relates to the affairs of an individual, the consent of the individual is required<sup>5</sup>.

If the information relates to the business of an undertaking, the consent of the person for the time being carrying on the business is required<sup>6</sup>; and for these purposes consent may be given:

- (1) in the case of a company, by a director, secretary or other officer of the company;
- (2) in the case of a partnership, by a partner;
- (3) in the case of an unincorporated body or association, by a person concerned in the management or control of the body or association<sup>7</sup>.

1     Ie the Enterprise Act 2002 Pt 9 (ss 237-247): see PARAS 326-327; the text and notes 2-7; and PARA 329 et seq.

2     As to the meaning of 'public authority' see PARA 327 note 3.

3     Enterprise Act 2002 s 239(1).

4     Enterprise Act 2002 s 239(2).

5     Enterprise Act 2002 s 239(3).

6     Enterprise Act 2002 s 239(4).

7     Enterprise Act 2002 s 239(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/ (ii) Permitted Disclosure/329. Disclosure for the purposes of Community obligations.

### **329. Disclosure for the purposes of Community obligations.**

Part 9 of the Enterprise Act 2002<sup>1</sup> does not prohibit the disclosure of information held by a public authority<sup>2</sup> to another person if the disclosure is required for the purpose of a Community obligation<sup>3</sup>.

1     Ie the Enterprise Act 2002 Pt 9 (ss 237-247): see PARAS 326-328, 330 et seq.

2     As to the meaning of 'public authority' see PARA 327 note 3.

3     Enterprise Act 2002 s 240.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/ (ii) Permitted Disclosure/330. Disclosure to facilitate the exercise of statutory functions.

### **330. Disclosure to facilitate the exercise of statutory functions.**

A public authority<sup>1</sup> which holds information to which the general restriction on disclosure applies<sup>2</sup> may disclose that information for the purpose of facilitating the exercise by the authority of any function it has under or by virtue of the Enterprise Act 2002 or any other enactment<sup>3</sup>. If information is disclosed under the above provision<sup>4</sup> so that it is not made available to the public, it must not be further disclosed by a person to whom it is so disclosed other than with the agreement of the public authority for the purpose mentioned in that provision<sup>5</sup>.

A public authority which holds information to which the general restriction on disclosure applies<sup>6</sup> may also disclose that information to any other person for the purpose of facilitating the exercise by that person of any function he has under or by virtue of:

- (1) the Enterprise Act 2002;
- (2) an enactment specified in Schedule 15 to that Act<sup>7</sup>;
- (3) such subordinate legislation as the Secretary of State may by order<sup>8</sup> specify for these purposes<sup>9</sup>.

Information disclosed under heads (1) to (3) above must not be used by the person to whom it is disclosed for any purpose other than a purpose relating to a function mentioned in those heads<sup>10</sup>.

1 As to the meaning of 'public authority' see PARA 327 note 3.

2 Information to which the Enterprise Act 2002 s 237 applies: see PARA 326.

3 Enterprise Act 2002 s 241(1). In s 241(1) the reference to an enactment includes a reference to an enactment contained in (1) an Act of the Scottish Parliament; (2) Northern Ireland legislation; (3) subordinate legislation: s 241(5). As to the meaning of 'subordinate legislation' see PARA 327 note 10.

It has been held in Scotland that 'function', construed in the context of s 241(1), connotes an act or activity susceptible of being facilitated by disclosure of information and does not connote an act or activity consisting of the disclosure of information: see *Dumfries and Galloway Council v Dunion, Scottish Information Comr* [2008] CSIH 12, 2008 SC 327, 2008 Scot (D) 8/2.

4 Information under the Enterprise Act 2002 s 241(1): see the text and notes 1-3.

5 Enterprise Act 2002 s 241(2).

6 See note 2.

7 The enactments so specified are: (1) the Gun Barrel Proof Act 1868 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 129, 355, **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 667; **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 487); (2) the Gun Barrel Proof Act 1950 (largely repealed); (3) the Trade Descriptions Act 1968 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 471 et seq); (4) the Unsolicited Goods and Services Act 1971 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 657 et seq) and the corresponding Northern Ireland provisions; (5) the Fair Trading Act 1973 (largely repealed; as to regulation of pyramid selling and similar trading schemes under that Act see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 853 et seq); (6) the Hallmarking Act 1973 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 765); (7) the Prices Act 1974 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 681 et seq); (8) the

relevant statutory provisions within the meaning of the Health and Safety at Work etc Act 1974 Pt I (ss 1-54) (see **HEALTH AND SAFETY AT WORK**) and the corresponding Northern Ireland provisions; (9) the Consumer Credit Act 1974 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 78 et seq; **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARAS 763, 768 et seq); (10) the Gun Barrel Proof Act 1978 (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARAS 129, 355, **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 667; **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 487); (11) the Estate Agents Act 1979 (see **AGENCY** vol 1 (2008) PARA 239 et seq); (12) the Competition Act 1980 (see PARAS 3, 10, 115; and **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 405); (13) the National Audit Act 1983 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**); (14) the Telecommunications Act 1984 (largely repealed); (15) the Video Recordings Act 1984 (see **LICENSING AND GAMBLING** vol 67 (2008) PARA 276 et seq); (16) the Weights and Measures Act 1985 (see **WEIGHTS AND MEASURES**) and Northern Ireland weights and measures legislation; (17) the Airports Act 1986 (see **AIR LAW**) and Northern Ireland airports legislation; (18) the Gas Act 1986 (see **FUEL AND ENERGY**); (19) the Insolvency Act 1986 (see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; COMPANY AND PARTNERSHIP INSOLVENCY**) and Northern Ireland insolvency legislation; (20) the Company Directors Disqualification Act 1986 (see **COMPANIES** vol 15 (2009) PARA 1575 et seq) and similar Northern Ireland legislation; (21) the Financial Services Act 1986 (repealed: see now the Financial Services and Markets Act 2000; and **FINANCIAL SERVICES AND INSTITUTIONS**); (22) the Consumer Protection Act 1987 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 518 et seq) and the corresponding Northern Ireland legislation; (23) the Banking Act 1987 (repealed); (24) the Education Reform Act 1988 (see **EDUCATION**); (25) the Copyright, Designs and Patents Act 1988 (see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS; PATENTS AND REGISTERED DESIGNS**); (26) the Education (Unrecognised Degrees) (Northern Ireland) Order 1988, SI 1988/1989; (27) the Water Act 1989 (largely repealed); (28) the Electricity Act 1989 (see **FUEL AND ENERGY**) and Northern Ireland electricity legislation; (29) the Companies Act 1989 (see **COMPANIES** vol 15 (2009) PARA 1568 et seq) and the corresponding Northern Ireland legislation; (30) the Courts and Legal Services Act 1990 (see **COURTS; LEGAL PROFESSIONS**); (31) the Broadcasting Act 1990 (see **TELECOMMUNICATIONS AND BROADCASTING**); (32) the Property Misdescriptions Act 1991 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 791 et seq); (33) the Water Industry Act 1991 (see **WATER AND WATERWAYS**); (34) the Water Resources Act 1991 (see **WATER AND WATERWAYS**); (35) the Statutory Water Companies Act 1991 (see **WATER AND WATERWAYS**); (36) the Land Drainage Act 1991 (see **WATER AND WATERWAYS**); (37) the Water Consolidation (Consequential Provisions) Act 1991 (see **WATER AND WATERWAYS**); (38) the Timeshare Act 1992 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 868 et seq); (39) the Clean Air Act 1993 (see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 45 (2010) PARA 207 et seq); (40) the Railways Act 1993 (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES**); (41) the Coal Industry Act 1994 (see **MINES, MINERALS AND QUARRIES**); (42) the Trade Marks Act 1994 (see **TRADE MARKS AND TRADE NAMES**); (43) the Gas Act 1995 (see **FUEL AND ENERGY**) and the corresponding Northern Ireland legislation; (44) the Broadcasting Act 1996 (see **TELECOMMUNICATIONS AND BROADCASTING**); (45) the Competition Act 1998 (see PARA 115 et seq); (46) the Financial Services and Markets Act 2000 (see **FINANCIAL SERVICES AND INSTITUTIONS**); (47) the Government Resources and Accounts Act 2000 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**); (48) the Postal Services Act 2000 (see **POST OFFICE**); (49) the Utilities Act 2000 (see **FUEL AND ENERGY**); (50) the Transport Act 2000 (see **AIR LAW; RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES; ROAD TRAFFIC**); (51) the Communications Act 2003 (see **TELECOMMUNICATIONS** vol 97 (2010) PARA 1 et seq); (52) the Fireworks Act 2003 (see **EXPLOSIVES**); (53) the Water Act 2003 (see **WATER AND WATERWAYS**) and certain Northern Ireland water and sewerage legislation; (54) the Railways Act 2005 (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES**); (55) the Gambling Act 2005 (see **LICENSING AND GAMBLING**); (56) the Compensation Act 2006 (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 553 et seq; and **DAMAGES; NEGLIGENCE**); (57) the Wireless Telegraphy Act 2006 (see **TELECOMMUNICATIONS AND BROADCASTING**); (58) the Consumers, Estate Agents and Redress Act 2007 (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 444; and **AGENCY**); and (59) the Companies Acts (as defined in the Companies Act 2006 s 2) (see **COMPANIES** vol 14 (2009) PARA 16); Enterprise Act 2002 Sch 15 (amended by the Communications Act 2003 Sch 17 para 174(1), (7); the Fireworks Act 2003 s 12(3); the Water Act 2003 Sch 7 Pt 2 para 36(1), (4); the Railways Act 2005 Sch 12 para 18(1), (4); the Consumers, Estate Agents and Redress Act 2007 s 29(2); and by SI 2003/1400; SI 2006/2909; SI 2006/3336; SI 2007/2194; SI 2007/2977).

The Secretary of State may by order amend the Enterprise Act 2002 Sch 15: s 241(6). The power to make such an order includes power to add, vary or remove a reference to any provision of (a) an Act of the Scottish Parliament; (b) Northern Ireland legislation: s 241(7). An order under s 214 must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 241(8). In the exercise of this power, the Secretary of State has made the amending orders cited above. As to the Secretary of State see PARA 5.

8 As to the making of the order see s 241(8), cited in note 7.

9 Enterprise Act 2002 s 241(3). As to the subordinate legislation specified for the purposes of s 241(3)(c) (see head (3) in the text) see the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003, SI 2003/1400, Sch 4 (amended by SI 2005/1803; SI 2006/599; SI 2006/1057; SI 2007/1846; SI 2008/1277; SI 2008/1816); the Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Specification) Order 2004, SI 2004/693, Sch 1 (amended by SI 2004/3201; SI 2006/3418; SI 2008/37; SI 2008/1597; SI 2008/2164).

10 Enterprise Act 2002 s 241(4). A person commits an offence if he uses information so disclosed to him for an unauthorised purpose: see PARA 335.

## UPDATE

### 330 Disclosure to facilitate the exercise of statutory functions

NOTE 9--SI 2004/693 Sch 1 further amended: SI 2008/1597.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/ (ii) Permitted Disclosure/331. Disclosure for the purposes of civil proceedings.

### 331. Disclosure for the purposes of civil proceedings.

A public authority<sup>1</sup> which holds prescribed information<sup>2</sup> to which the general restriction on disclosure applies<sup>3</sup> may disclose that information to any person:

- (1) for the purposes of, or in connection with, prescribed civil proceedings<sup>4</sup>, including prospective proceedings, in the United Kingdom<sup>5</sup> or elsewhere; or
- (2) for the purposes of obtaining legal advice in relation to such proceedings; or
- (3) otherwise for the purposes of establishing, enforcing or defending legal rights that are or may be the subject of such proceedings<sup>6</sup>.

Certain information may not, however, be so disclosed<sup>7</sup>.

Information disclosed under these provisions must not be used by the person to whom it is disclosed for any purpose other than those specified in heads (1) to (3) above<sup>8</sup>.

1 As to the meaning of 'public authority' see PARA 327 note 3.

2 For these purposes, 'prescribed' means prescribed by order of the Secretary of State: Enterprise Act 2002 s 241A(3) (s 241A added by the Companies Act 2006 s 1281). An order under the Enterprise Act 2002 s 241A: (1) may prescribe information, or civil proceedings, for the purposes of s 241A by reference to such factors as appear to the Secretary of State to be appropriate; (2) may prescribe for those purposes all information, or civil proceedings, or all information or civil proceedings not falling within one or more specified exceptions; (3) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 241A(4) (as so added). As to the Secretary of State see PARA 5.

In the exercise of these powers the Secretary of State has made the Enterprise Act 2002 (Disclosure of Information for Civil Proceedings etc) Order 2007, SI 2007/2193, which came into force on 1 October 2007: art 1(1). The prescribed information is all specified information to which the Enterprise Act 2002 s 237 applies (see PARA 326) (other than the categories of information set out in s 241A(2): see note 7) with the exception of (a) information which comes to the Office of Fair Trading (the 'OFT') in connection with the exercise of its functions under: (i) s 5(1) (acquisition of information etc: see PARA 7) with a view to exercising its functions under s 6 (provision of information etc to the public: see PARA 7), s 7 (provision of information and advice to ministers etc: see PARA 7), or s 8 (promoting good consumer practice: see PARA 7); (ii) s 11 (super-complaints to OFT: see PARA 8); (iii) s 92 (duty of OFT to monitor orders and undertakings relating to mergers: see PARA 243); (iv) s 162 (duty of OFT to monitor orders and undertakings relating to market investigations: see PARA 304); (v) Pt 6 (ss 188-202) (cartel offence: see PARA 319 et seq); (vi) Sch 24 paras 14-18 (monopoly references, enforcement undertakings and orders); (b) information which comes to a regulator in connection with the exercise of its functions under s 11 (super-complaints to OFT) as applied by s 205 (super-complaints to regulators other than OFT: see PARA 8); and (c) information which comes to Her Majesty's Revenue and Customs in connection with the exercise of their functions under the Customs and Excise Management Act 1979 and the Value Added Tax Act 1994 (see **CUSTOMS AND EXCISE; VALUE ADDED TAX**): Enterprise Act 2002 (Disclosure of Information for Civil Proceedings etc) Order

2007, SI 2007/2193, arts 1(2), 2. As to the meaning of 'specified information' see PARA 327; and as to the OFT see PARAS 6-8.

3      le information to which the Enterprise Act 2002 s 237 applies: see PARA 326.

4      The following civil proceedings are prescribed for these purposes: (1) proceedings relating to or arising out of a legal right or obligation of a consumer; (2) proceedings relating to or arising out of the infringement of an intellectual property right; (3) proceedings relating to or arising out of passing off or the misuse of a trade secret: Enterprise Act 2002 (Disclosure of Information for Civil Proceedings etc) Order 2007, SI 2007/2193, art 3(1). In head (1) above, a 'consumer' is an individual who (a) is acting outside his trade, business or profession; or (b) is acting with a view to carrying on a business but not in the course of a business carried on by him: art 3(2). In head (2) above, an 'intellectual property right' includes a patent, copyright, and analogous or related right, database right, registered or unregistered design right, registered trade mark, topography right, supplementary protection certificate, plant variety right, protected designation of origin or a protected geographical indication: art 3(3).

5      As to the meaning of 'United Kingdom' see PARA 401 note 1.

6      Enterprise Act 2002 s 241A(1) (as added: see note 2).

7      The Enterprise Act 2002 s 241A(1) (see the text and notes 1-6) does not apply to (1) information which comes to a public authority in connection with an investigation under the Fair Trading Act 1973 Pt IV, Pt V or Pt VI (all repealed) or under the Competition Act 1980 s 11 (see PARA 10); (2) competition information within the meaning of the Financial Services and Markets Act 2000 s 351 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 479); (3) information which comes to a public authority in connection with an investigation under the Enterprise Act 2002 Pt 3 (ss 22-130) (see PARA 172 et seq) or Pt 4 (ss 131-184) (see PARA 276 et seq) or s 174 (see PARA 314); (4) information which comes to a public authority in connection with an investigation under the Competition Act 1998 (see PARA 115 et seq): Enterprise Act 2002 s 241A(2) (as added: see note 2).

8      Enterprise Act 2002 s 241A(5) (as added: see note 2). A person commits an offence if he uses information so disclosed to him for an unauthorised purpose: see PARA 335.

## UPDATE

### 331 Disclosure for the purposes of civil proceedings

NOTE 7--Companies Act 1980 s 11 amended: SI 2009/1941.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/ (ii) Permitted Disclosure/332. Disclosure for the purposes of criminal proceedings.

### 332. Disclosure for the purposes of criminal proceedings.

A public authority<sup>1</sup> which holds information to which the general restriction on disclosure applies<sup>2</sup> may disclose that information to any person:

- (1) in connection with the investigation of any criminal offence in any part of the United Kingdom<sup>3</sup>;
- (2) for the purposes of any criminal proceedings there;
- (3) for the purpose of any decision whether to start or bring to an end such an investigation or proceedings<sup>4</sup>.

A public authority must not, however, make a disclosure under these provisions unless it is satisfied that the making of the disclosure is proportionate to what is sought to be achieved by it<sup>5</sup>.



Information so disclosed must not be used by the person to whom it is disclosed for any purpose other than that for which it is disclosed<sup>6</sup>.

- 1 As to the meaning of 'public authority' see PARA 327 note 3.
- 2 The information to which the Enterprise Act 2002 s 237 applies: see PARA 326.
- 3 As to the meaning of 'United Kingdom' see PARA 401 note 1.
- 4 Enterprise Act 2002 s 242(1).
- 5 Enterprise Act 2002 s 242(3).
- 6 Enterprise Act 2002 s 242(2). A person commits an offence if he uses information so disclosed to him for an unauthorised purpose: see PARA 335.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/ (ii) Permitted Disclosure/333. Overseas disclosures.

### **333. Overseas disclosures.**

A public authority<sup>1</sup> which holds information to which the general restriction on disclosure applies<sup>2</sup> (the 'discloser') may disclose that information to an overseas public authority<sup>3</sup> for the following purpose<sup>4</sup>, namely the purpose of facilitating the exercise by the overseas public authority of any function which it has relating to:

- (1) carrying out investigations in connection with the enforcement of any relevant legislation<sup>5</sup> by means of civil proceedings<sup>6</sup>;
- (2) bringing civil proceedings for the enforcement of such legislation or the conduct of such proceedings<sup>7</sup>;
- (3) the investigation of crime<sup>8</sup>;
- (4) bringing criminal proceedings or the conduct of such proceedings<sup>9</sup>;
- (5) deciding whether to start or bring to an end such investigations or proceedings<sup>10</sup>.

Certain information may not, however, be so disclosed<sup>11</sup>.

The Secretary of State<sup>12</sup> may direct that a disclosure permitted by these provisions must not be made if he thinks that in connection with any matter in respect of which the disclosure could be made it is more appropriate:

- (a) if any investigation is to be carried out, that it is carried out by an authority in the United Kingdom or in another specified country or territory<sup>13</sup>;
- (b) if any proceedings are to be brought, that they are brought in a court in the United Kingdom or in another specified country or territory<sup>14</sup>;

and he must take such steps as he thinks are appropriate to bring such a direction to the attention of persons likely to be affected by it<sup>15</sup>.

In deciding whether to disclose information under these provisions a public authority must have regard in particular to the following considerations:

- (i) whether the matter in respect of which the disclosure is sought is sufficiently serious to justify making the disclosure<sup>16</sup>;
- (ii) whether the law of the country or territory to whose authority the disclosure would be made provides appropriate protection<sup>17</sup> against self-incrimination in criminal proceedings<sup>18</sup>;
- (iii) whether the law of that country or territory provides appropriate protection in relation to the storage and disclosure of personal data<sup>19</sup>;
- (iv) whether there are arrangements in place for the provision of mutual assistance as between the United Kingdom and that country or territory in relation to the disclosure of information of the kind to which the general restriction on disclosure<sup>20</sup> applies<sup>21</sup>.

The Secretary of State may by order<sup>22</sup> modify the list of considerations in heads (i) to (iv) above<sup>23</sup>. He may also, by order, add to those considerations<sup>24</sup> or remove any of those considerations<sup>25</sup>.

Information disclosed under these provisions:

- (A) may be disclosed subject to the condition that it must not be further disclosed without the agreement of the discloser<sup>26</sup>; and
- (B) must not otherwise be used by the overseas public authority to which it is disclosed for any purpose other than that for which it is first disclosed<sup>27</sup>.

1 As to the meaning of 'public authority' see PARA 327 note 3.

2 Information to which the Enterprise Act 2002 s 237 applies: see PARA 326.

3 An 'overseas public authority' is a person or body in any country or territory outside the United Kingdom which appears to the discloser to exercise functions of a public nature in relation to any of the matters mentioned in the Enterprise Act 2002 s 243(2)(a)-(e) (see heads (1)-(5) in the text): s 243(11). As to the meaning of 'United Kingdom' see PARA 401 note 1.

4 Enterprise Act 2002 s 243(1).

5 'Relevant legislation' is (1) the Enterprise Act 2002, any enactment specified in Sch 14 (see PARA 327 note 11) and such subordinate legislation as is specified by order for the purposes of s 238(1) (see PARA 327 note 13); (2) any enactment or subordinate legislation specified in an order under s 211(2) (see PARA 340); (3) any enactment or subordinate legislation specified in an order under s 212(3) (see PARA 341); (4) legislation in any country or territory outside the United Kingdom which appears to the discloser to make provision corresponding to the Enterprise Act 2002 or to any such enactment or subordinate legislation: s 243(12). As to the meaning of 'subordinate legislation' see PARA 327 note 10.

6 Enterprise Act 2002 s 243(2)(a).

7 Enterprise Act 2002 s 243(2)(b).

8 Enterprise Act 2002 s 243(2)(c).

9 Enterprise Act 2002 s 243(2)(d).

10 Enterprise Act 2002 s 243(2)(e).

11 The Enterprise Act 2002 s 243(1) (see the text and notes 1-4) does not apply to any of the following: (1) information which is held by a person who is designated by virtue of s 213(4) (see PARA 342) as a designated enforcer for the purposes of Pt 8 (ss 210-236) (see PARA 339 et seq); (2) information which comes to a public authority in connection with an investigation under the Fair Trading Act 1973 Pt IV, Pt V or Pt VI (all repealed) or under the Competition Act 1980 s 11 (see PARA 10); (3) competition information within the meaning of the Financial Services and Markets Act 2000 s 351 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 479); (4) information which comes to a public authority in connection with an investigation under the Enterprise Act 2002 Pt 3 (ss 22-130) (see PARA 172 et seq) or Pt 4 (ss 131-184) (see PARA 276 et seq) or s 174 (see PARA 314): Enterprise Act 2002 s 243(3).

12 As to the Secretary of State see PARA 5.

13 Enterprise Act 2002 s 243(4)(a). A person who discloses information in contravention of such a direction is guilty of an offence: see PARA 335.

14 Enterprise Act 2002 s 243(4)(b); and see note 13.

15 Enterprise Act 2002 s 243(5).

16 Enterprise Act 2002 s 243(6)(a).

17 Protection is appropriate if it provides protection in relation to the matter in question which corresponds to that so provided in any part of the United Kingdom: Enterprise Act 2002 s 243(7).

18 Enterprise Act 2002 s 243(6)(b).

19 Enterprise Act 2002 s 243(6)(c).

20 See note 2.

21 Enterprise Act 2002 s 243(6)(d).

22 An order under the Enterprise Act 2002 s 243(8) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 243(9). At the date at which this volume states the law, no such order had been made.

23 Enterprise Act 2002 s 243(8)(a); and see note 22.

24 Enterprise Act 2002 s 243(8)(b); and see note 22.

25 Enterprise Act 2002 s 243(8)(c); and see note 22.

26 Enterprise Act 2002 s 243(10)(a).

27 Enterprise Act 2002 s 243(10)(b). A person commits an offence if he uses information so disclosed to him for an unauthorised purpose: see PARA 335.

## **UPDATE**

### **333 Overseas disclosures**

NOTE 11--Competition Act 1980 s 11 amended: SI 2009/1941.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/ (ii) Permitted Disclosure/334. Considerations relevant to disclosure.

### **334. Considerations relevant to disclosure.**

A public authority<sup>1</sup> must have regard to the following considerations before disclosing any specified<sup>2</sup> information<sup>3</sup>.

The first consideration is the need to exclude from disclosure, so far as practicable, any information whose disclosure the authority thinks is contrary to the public interest<sup>4</sup>.

The second consideration is the need to exclude from disclosure, so far as practicable:

- (1) commercial information whose disclosure the authority thinks might significantly harm the legitimate business interests of the undertaking to which it relates<sup>5</sup>; or
- (2) information relating to the private affairs of an individual whose disclosure the authority thinks might significantly harm the individual's interests<sup>6</sup>.

The third consideration is the extent to which the disclosure of the information mentioned in head (1) or head (2) above is necessary for the purpose for which the authority is permitted to make the disclosure<sup>7</sup>.

Additional considerations apply in the case of overseas disclosures<sup>8</sup>.

- 1 As to the meaning of 'public authority' see PARA 327 note 3.
- 2 I.e. specified information within the meaning of the Enterprise Act 2002 s 238(1): see PARA 327.
- 3 Enterprise Act 2002 s 244(1).
- 4 Enterprise Act 2002 s 244(2).
- 5 Enterprise Act 2002 s 244(3)(a).
- 6 Enterprise Act 2002 s 244(3)(b).
- 7 Enterprise Act 2002 s 244(4).
- 8 See PARA 333.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/4. THE ENTERPRISE ACT 2002/(5) INFORMATION/(iii) Offences/335. Offences in relation to disclosure.

### **(iii) Offences**

#### **335. Offences in relation to disclosure.**

A person commits an offence<sup>1</sup> if he:

- (1) discloses information to which the general restriction on disclosure applies<sup>2</sup> in contravention<sup>3</sup> of that restriction<sup>4</sup>;
- (2) discloses information in contravention of a direction with regard to overseas disclosure given<sup>5</sup> by the Secretary of State<sup>6</sup>;
- (3) uses information disclosed to him under Part 9 of the Enterprise Act 2002<sup>7</sup> for a purpose which is not permitted under that Part<sup>8</sup>.

- 1 A person who commits an offence under the Enterprise Act 2002 s 245 (see heads (1)-(3) in the text) is liable (1) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding the statutory maximum, or to both; (2) on conviction on indictment to imprisonment for a term not exceeding two years or to a fine, or to both: s 245(4). As to the statutory maximum see PARA 140 note 9.
- 2 I.e. information to which the Enterprise Act 2002 s 237 applies: see PARA 326.
- 3 I.e. in contravention of the Enterprise Act 2002 s 237(2): see PARA 326.

- 4 Enterprise Act 2002 s 245(1). As to the penalty for such an offence see note 1.
- 5 Ie a direction given under the Enterprise Act 2002 s 243(4): see PARA 333.
- 6 See the Enterprise Act 2002 s 245(2). As to the penalty for such an offence see note 1. As to the Secretary of State see PARA 5.
- 7 Ie under the Enterprise Act 2002 Pt 9 (ss 237-247): see PARA 326 et seq.
- 8 Enterprise Act 2002 s 245(3). As to the penalty for such an offence see note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(1) INTRODUCTION/336. Consumer protection; in general.

## 5. FAIR TRADING

### (1) INTRODUCTION

#### 336. Consumer protection; in general.

In addition to its role as the competition authority<sup>1</sup>, the Office of Fair Trading (the 'OFT') is the United Kingdom's consumer authority. The OFT has the function of promoting good practice in the carrying out of activities which may affect the economic interests of consumers in the United Kingdom<sup>2</sup>. In carrying out that function, the OFT may approve consumer codes<sup>3</sup>. The OFT also manages Consumer Direct, a telephone helpline and online service providing impartial advice and information to consumers<sup>4</sup>.

The OFT has a number of enforcement duties and a range of enforcement powers derived from consumer protection legislation, notably: the Consumer Credit Act 1974<sup>5</sup>; the Estate Agents Act 1979<sup>6</sup>; the Unfair Terms in Consumer Contracts Regulations 1999<sup>7</sup>; the Consumer Protection (Distance Selling) Regulations 2000<sup>8</sup>; the Consumer Protection from Unfair Trading Regulations 2008<sup>9</sup>; the Business Protection from Misleading Marketing Regulations 2008<sup>10</sup>; and Part 8 of the Enterprise Act 2002<sup>11</sup>.

Sector regulators have been put in place to ensure the protection of consumers in relation to utilities<sup>12</sup>.

- 1 As to the OFT's general functions see PARA 7. As to the OFT see PARAS 6-8.
- 2 See the Enterprise Act 2002 s 8(1); and PARA 7. As to the meaning of 'United Kingdom' see PARA 401 note 1.
- 3 See the Enterprise Act 2002 s 8(2); and PARA 7.
- 4 See OFT *Statement of Consumer Protection Enforcement Principles* (December 2008) (OFT964).
- 5 See **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 78 et seq.
- 6 See PARA 338.
- 7 Ie the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083. See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 452 et seq.
- 8 Ie the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334. See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 673 et seq.

9 le the Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277. See generally **SALE OF GOODS AND SUPPLY OF SERVICES**.

10 le the Business Protection from Misleading Marketing Regulations 2008, SI 2008/1276. See **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 731 et seq.

11 See PARA 339 et seq.

12 See PARA 18 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(1) INTRODUCTION/337. Codes of practice.

### **337. Codes of practice.**

As an important alternative to powers of legal enforcement as a means of diminishing unfair conduct, the Office of Fair Trading (the 'OFT')<sup>1</sup> may make arrangements for approving consumer codes<sup>2</sup> and may, in accordance with the arrangements, give its approval to or withdraw its approval from any consumer code<sup>3</sup>.

1 As to the OFT see PARAS 6-8.

2 'Consumer code' means a code of practice or other document (however described) intended, with a view to safeguarding or promoting the interests of consumers, to regulate by any means the conduct of persons engaged in the supply of goods or services to consumers (or the conduct of their employees or representatives): Enterprise Act 2002 s 8(6).

3 Enterprise Act 2002 s 8(2). See also PARA 7. See the OFT's *Consumer Codes Approval Scheme - Core criteria and guidance* (March 2008) (OFT390).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(1) INTRODUCTION/338. Control of estate agents.

### **338. Control of estate agents.**

Powers have been given to the Office of Fair Trading (the 'OFT')<sup>1</sup> under the Estate Agents Act 1979 to prohibit unfit persons from engaging in estate agency work<sup>2</sup>. It is the duty of the OFT generally to superintend the working and enforcement of the Act and, where necessary or expedient, itself to take steps to enforce it<sup>3</sup>.

1 As to the OFT see PARAS 6-8.

2 See the Estate Agents Act 1979 s 3; and **AGENCY** vol 1 (2008) PARA 267.

3 See the Estate Agents Act 1979 s 25; and **AGENCY** vol 1 (2008) PARA 278.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(i) In general/339. Consumers.

## (2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE

### (i) In general

#### 339. Consumers.

In relation to the enforcement of certain consumer legislation under the Enterprise Act 2002<sup>1</sup>, references to consumers are to be construed as follows<sup>2</sup>.

In relation to a domestic infringement<sup>3</sup> a consumer is an individual in respect of whom the following conditions are satisfied<sup>4</sup>:

- (1) the first condition is that: (a) goods<sup>5</sup> are or are sought to be supplied to the individual (whether by way of sale or otherwise) in the course of a business<sup>6</sup> carried on by the person supplying or seeking to supply them; or (b) services<sup>7</sup> are or are sought to be supplied to the individual in the course of a business carried on by the person supplying or seeking to supply them<sup>8</sup>;
- (2) the second condition is that: (a) the individual receives or seeks to receive the goods or services otherwise than in the course of a business carried on by him; or (b) the individual receives or seeks to receive the goods or services with a view to carrying on a business but not in the course of a business carried on by him<sup>9</sup>.

In relation to a Community infringement<sup>10</sup> a consumer is a person who is a consumer for the purposes of the Injunctions Directive<sup>11</sup>, and the listed Directive<sup>12</sup> or the listed Regulation<sup>13</sup> concerned<sup>14</sup>.

1        In the Enterprise Act 2002 Pt 8 (ss 210-236). The Enterprise Act 2002 Pt 8 binds the Crown; but the powers conferred by ss 227A-227D (see PARAS 355-357) are not exercisable in relation to premises occupied by the Crown: s 236 (substituted by SI 2006/3363). The Enterprise Act 2002 Pt 8 is specified for the purposes of the Regulatory Enforcement and Sanctions Act 2008 Pt 1 (ss 1-21): see s 4(2), Sch 3. See further **LOCAL GOVERNMENT** vol 69 (2009) PARA 733.

2        Enterprise Act 2002 s 210(1).

3        As to domestic infringements see PARA 340.

4        Enterprise Act 2002 s 210(2).

5        'Goods' include buildings and other structures and ships, aircraft and hovercraft: Enterprise Act 2002 s 232(1), (2). The supply of goods includes: (1) supply by way of sale, lease, hire or hire purchase; (2) in relation to buildings and other structures, construction of them by one person for another: s 232(3). Goods or services which are supplied wholly or partly outside the United Kingdom must be taken to be supplied to or for a person in the United Kingdom if they are supplied in accordance with arrangements falling within s 232(5): s 232(4). Arrangements fall within s 232(5) if they are made by any means and: (a) at the time the arrangements are made the person seeking the supply is in the United Kingdom; or (b) at the time the goods or services are supplied (or ought to be supplied in accordance with the arrangements) the person responsible under the arrangements for effecting the supply is in or has a place of business in the United Kingdom: s 232(5). As to the meaning of 'United Kingdom' see PARA 401 note 1.

Where a reference is made in Pt 8 to a person supplying or seeking to supply goods under a hire-purchase agreement, a credit-sale agreement or a conditional sale agreement, the reference includes a reference to a person who conducts any antecedent negotiations relating to the agreement: s 233(1), (2). 'Hire-purchase agreement', 'credit-sale agreement', 'conditional sale agreement' and 'antecedent negotiations' are to be construed in accordance with the Consumer Credit Act 1974 s 189 (see **CONSUMER CREDIT** vol 9(1) (Reissue) PARAS 93, 95, 177): Enterprise Act 2002 s 233(3).

6 A business includes: (1) professional practice; (2) any other undertaking carried on for gain or reward; (3) any undertaking in the course of which goods or services are supplied otherwise than free of charge: Enterprise Act 2002 s 210(8). For the purposes of a domestic infringement it is immaterial whether a person supplying goods or services has a place of business in the United Kingdom: s 210(5).

7 The supply of services does not include the provision of services under a contract of service or of apprenticeship whether it is express or implied and (if it is express) whether it is oral or in writing: Enterprise Act 2002 s 234(1), (2). The supply of services includes: (1) performing for gain or reward any activity other than the supply of goods; (2) rendering services to order; (3) the provision of services by making them available to potential users: s 234(3). The supply of services includes making arrangements for the use of computer software or for granting access to data stored in any form which is not readily accessible: s 234(4). The supply of services includes making arrangements by means of a relevant agreement (within the meaning of the Telecommunications Act 1984 Sch 2 para 29 (see **TELECOMMUNICATIONS** vol 97 (2010) PARA 162)) for sharing the use of telecommunications apparatus: Enterprise Act 2002 s 234(5) (amended by the Communications Act 2003 Sch 17 para 174(1), (6)).

The supply of services also includes permitting or making arrangements to permit the use of land in such circumstances as the Secretary of State specifies by order: Enterprise Act 2002 s 234(6). The power to make such an order must be exercised by statutory instrument, a draft of which must have been laid before Parliament and approved by a resolution of each House: s 234(7), (8). In exercise of this power, the Enterprise Act 2002 (Supply of Services) Order 2003, SI 2003/1594, has been made. As to the Secretary of State see PARA 5.

8 Enterprise Act 2002 s 210(3).

9 Enterprise Act 2002 s 210(4).

10 As to Community infringements see PARA 341.

11 The Injunctions Directive is EC Directive 98/27 of the European Parliament and of the Council on injunctions for the protection of consumers' interests (OJ L166, 11.6.98, p 51): Enterprise Act 2002 s 235.

12 A Directive is a listed Directive if it is a Directive of the Council of the European Communities or of the European Parliament and of the Council, and if it is specified in the Enterprise Act 2002 Sch 13 or to the extent that any of its provisions is so specified: s 210(7). The following Directives have been specified in the Enterprise Act 2002 Sch 13 Pt 1 (amended by SI 2004/2095; SI 2006/3363; SI 2008/1277): EEC Council Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises (OJ L372, 31.12.85, p 31); EEC Council Directive 87/102 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit (OJ L42, 12.2.87, p 48); EEC Council Directive 90/314 on package travel, package holidays and package tours (OJ L158, 23.6.90, p 59); EEC Council Directive 93/13 on unfair terms in consumer contracts (OJ L95, 21.4.93, p 29); EC Directive 97/7 of the European Parliament and of the Council on the protection of consumers in respect of distance contracts (OJ L144, 4.6.97, p 19); EC Directive 98/6 of the European Parliament and of the Council on consumer protection in the indication of the prices of products offered to consumers (OJ L80, 18.3.98, p 27); EC Directive 1999/44 of the European Parliament and of the Council on certain aspects of the sale of consumer goods and associated guarantees (OJ L171, 7.7.99, p 12); EC Directive 2000/31 of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (OJ L178, 17.7.2000, p 1); EC Directive 2002/65 of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending EEC Council Directive 90/619 and EC Directives 97/7 and 98/27 (OJ L271, 9.10.2002, p 16); EC Regulation 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights (OJ L46, 17.2.2004, p 1); EC Directive 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (OJ L149, 11.6.2005, p 22); EC Directive 2008/122 of the European Parliament and of the Council on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts (OJ L33, 3.2.2009, p 10).

The following provisions of Directives have been specified in the Enterprise Act 2002 Sch 13 Pt 2 (amended by SI 2005/2759; SI 2008/1277): EEC Council Directive 89/552 on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ L298, 17.10.89, p 23) arts 10-21; EC Directive 2001/83 of the European Parliament and of the Council on the Community Code relating to medicinal products for human use (OJ L311, 28.11.2001, p 67) arts 86-100 as read with EC Directive 2004/24 of the European Parliament and of the Council amending, as regards traditional herbal medicinal products, the code (OJ L136, 30.4.2004, p 85), and EC Directive 2004/27 of the European Parliament and of the Council also amending the code (OJ L136, 30.4.2004, p 34).

The Secretary of State may by order modify the Enterprise Act 2002 Sch 13: s 210(9). An order under this provision must be made by statutory instrument subject to annulment in pursuance of a resolution of either



House of Parliament: s 210(10). In exercise of this power the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003, SI 2003/1374, has been made.

13 A Regulation is a listed Regulation if it is a Regulation of the Council of the European Communities or of the European Parliament and of the Council, and if it is specified in the Enterprise Act 2002 Sch 13 or to the extent that any of its provisions is so specified (see note 12): s 210(7A) (added by SI 2006/3363).

14 Enterprise Act 2002 s 210(6).

## **UPDATE**

### **339 Consumers**

NOTE 11--Directive 98/27 replaced: European Parliament and EC Council Directive 2009/22 (OJ L110, 1.5.2009, p 33); references to the repealed directive should be construed as references to Directive 2009/22 and read in accordance with the correlation table in Annex III: art 9.

NOTE 12--Enterprise Act 2002 Sch 13 Pt I further amended to specify European Parliament and EC Council Directive 2006/123 (OJ L376, 27.12.2006, p 36) on services in the internal market: SI 2009/2999. See further Coroners and Justice Act 2009 s 143 (implementation of E-Commerce and Services directives: penalties).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(i) In general/340. Domestic infringements.

### **340. Domestic infringements.**

A domestic infringement is an act or omission which: (1) is done or made by a person in the course of a business; (2) harms the collective interests of consumers<sup>1</sup> in the United Kingdom<sup>2</sup>; and (3) is of a description specified by the Secretary of State by order<sup>3</sup> which consists of any of the following<sup>4</sup>:

- (a) a contravention of an enactment<sup>5</sup> which imposes a duty, prohibition or restriction enforceable by criminal proceedings<sup>6</sup>;
- (b) an act done or omission made in breach of contract<sup>7</sup>;
- (c) an act done or omission made in breach of a non-contractual duty owed to a person by virtue of an enactment or rule of law and enforceable by civil proceedings<sup>8</sup>;
- (d) an act or omission in respect of which an enactment provides for a remedy or sanction enforceable by civil proceedings<sup>9</sup>;
- (e) an act done or omission made by a person supplying or seeking to supply goods or services as a result of which an agreement or security relating to the supply is void or unenforceable to any extent<sup>10</sup>;
- (f) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to exercise a right or remedy relating to the supply in circumstances where the exercise of the right or remedy is restricted or excluded under or by virtue of an enactment<sup>11</sup>;
- (g) an act or omission by which a person supplying or seeking to supply goods or services purports or attempts to avoid (to any extent) liability relating to the supply in circumstances where such avoidance is restricted or prevented under an enactment<sup>12</sup>.

An order may provide that any description of an act or omission falling within heads (a) to (g) is not a domestic infringement<sup>13</sup>.

For these purposes it is immaterial: (i) whether or not any duty, prohibition or restriction exists in relation to consumers as such; (ii) whether or not any remedy or sanction is provided for the benefit of consumers as such; (iii) whether or not any proceedings have been brought in relation to the act or omission; (iv) whether or not any person has been convicted of an offence in respect of the contravention mentioned in head (a) above; (v) whether or not there is a waiver in respect of the breach of contract mentioned in head (b) above<sup>14</sup>.

1 As to the meaning of 'consumers' see PARA 339.

2 It has been held in Scotland that harm to the collective interests of consumers for these purposes will normally be inferred from the existence of a number of individual breaches of contract or other relevant defaults on the part of a trader, but it has to be possible to conclude that something more exists than an accumulation of individual breaches; the extra element is harm to the public generally, in their capacity as consumers, or more precisely to the section of the public who are likely to buy or consider buying the trader's goods: see *Office of Fair Trading v MB Designs (Scotland) Ltd, Martin Black and Paul Bradley Bett* [2005] CSOH 85 at [31], 2005 SCLR 894 at [31]. As to the meaning of 'United Kingdom' see PARA 401 note 1.

3 As to the Secretary of State see PARA 5. The power to make an order under the Enterprise Act 2002 s 211 must be exercised by statutory instrument but no such order may be made unless a draft of it has been laid before Parliament and approved by a resolution of each House: s 211(6), (7). In exercise of this power the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003, SI 2003/1374, has been made.

4 Enterprise Act 2002 s 211(1).

5 References to an enactment include references to subordinate legislation (within the meaning of the Interpretation Act 1978 (see **STATUTES** vol 44(1) (Reissue) PARA 1381)): Enterprise Act 2002 s 211(5).

6 Enterprise Act 2002 s 211(2)(a).

7 Enterprise Act 2002 s 211(2)(b). As to evidence in proceedings under Pt 8 (ss 210-236) that such an act or omission has occurred see s 228; and PARA 353.

8 Enterprise Act 2002 s 211(2)(c). As to evidence in proceedings under Pt 8 that such an act or omission has occurred see s 228; and PARA 353.

9 Enterprise Act 2002 s 211(2)(d). As to evidence in proceedings under Pt 8 that such an act or omission has occurred see s 228; and PARA 353.

10 Enterprise Act 2002 s 211(2)(e).

11 Enterprise Act 2002 s 211(2)(f).

12 Enterprise Act 2002 s 211(2)(g).

13 Enterprise Act 2002 s 211(3).

14 Enterprise Act 2002 s 211(4).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(i) In general/341. Community infringements.

### **341. Community infringements.**

A Community infringement is an act or omission which harms the collective interests of consumers<sup>1</sup> and which:

- (1) contravenes a listed Directive<sup>2</sup> as given effect by the laws, regulations or administrative provisions of an EEA state<sup>3</sup>;
- (2) contravenes such laws, regulations or administrative provisions which provide additional permitted protections<sup>4</sup>;
- (3) contravenes a listed Regulation<sup>5</sup>; or
- (4) contravenes any laws, regulations or administrative provisions of an EEA state which give effect to a listed Regulation<sup>6</sup>.

The Secretary of State may by order<sup>7</sup> specify for these purposes the law in the United Kingdom<sup>8</sup> which:

- (a) gives effect to the listed Directives;
- (b) provides additional permitted protections; or
- (c) gives effect to a listed Regulation<sup>9</sup>.

1 As to the meaning of 'consumers' see PARA 339.

2 For these purposes, references to a listed Directive must be construed in accordance with the Enterprise Act 2002 s 210 (see PARA 339 note 12): s 212(4).

3 Enterprise Act 2002 s 212(1)(a) (amended by SI 2006/3363). As to evidence in proceedings under the Enterprise Act 2002 Pt 8 (ss 210-236) that such an act or omission has occurred see s 228; and PARA 353. 'EEA state', in relation to any time, means (1) a state which at that time is a member state of the European Community; or (2) any other state which at that time is a party to the EEA agreement: Interpretation Act 1978 Sch 1 (definition added by the Legislative and Regulatory Reform Act 2006 s 26(1); applied by the Enterprise Act 2002 s 212(5) (substituted by SI 2007/528)). 'EEA agreement' means the agreement on the European Economic Area signed at Oporto on 2 May 1992, together with the Protocol adjusting that agreement signed at Brussels on 17 March 1993, as modified or supplemented from time to time: Interpretation Act 1978 Sch 1 (definition as so added and applied).

4 Enterprise Act 2002 s 212(1)(b). As to evidence in proceedings under Pt 8 that such an act or omission has occurred see s 228; and PARA 353. The laws, regulations or administrative provisions of an EEA state which give effect to a listed Directive provide additional permitted protections if (1) they provide protection for consumers which is in addition to the minimum protection required by the Directive concerned; and (2) such additional protection is permitted by that Directive: Enterprise Act 2002 s 212(2).

5 Enterprise Act 2002 s 212(1)(c) (added by SI 2006/3363). As to evidence in proceedings under the Enterprise Act 2002 Pt 8 that such an act or omission has occurred see s 228; and PARA 353. For these purposes, references to a listed Regulation must be construed in accordance with the Enterprise Act 2002 s 210 (see PARA 339 note 13): s 212(4) (amended by SI 2006/3363).

6 Enterprise Act 2002 s 212(1)(d) (added by SI 2006/3363). As to evidence in proceedings under the Enterprise Act 2002 Pt 8 that such an act or omission has occurred see s 228; and PARA 353.

7 As to the Secretary of State see PARA 5. An order under the Enterprise Act 2002 s 212 must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 212(6). See also note 9.

8 As to the meaning of 'United Kingdom' see PARA 401 note 1.

9 Enterprise Act 2002 s 212(3) (amended by SI 2006/3363). In the exercise of this power the following orders have been made: (1) the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2003, SI 2003/1374; (2) the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) (Amendment) Order 2005, SI 2005/2418; and (3) the Enterprise Act 2002 (Part 8 Community Infringements Specified UK Laws) Order 2006, SI 2006/3372.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(i) In general/342. Enforcers.

### **342. Enforcers.**

Each of the following is a general enforcer<sup>1</sup>:

- (1) the Office of Fair Trading (the 'OFT')<sup>2</sup>;
- (2) every local weights and measures authority in Great Britain<sup>3</sup>;
- (3) the Department of Enterprise, Trade and Investment in Northern Ireland<sup>4</sup>.

A designated enforcer<sup>5</sup> is any person or body (whether or not incorporated) which the Secretary of State<sup>6</sup> thinks has as one of its purposes the protection of the collective interests of consumers<sup>7</sup> and designates<sup>8</sup> by order<sup>9</sup>. If requested to do so by a designated enforcer which is designated in respect of one or more Community infringements<sup>10</sup> the Secretary of State must notify the Commission of the European Communities of its name and purpose and of the Community infringements in respect of which it is designated<sup>11</sup>. The Secretary of State must also notify the Commission:

- (a) of the fact that a person or body in respect of which he has given such notice<sup>12</sup> ceases to be a designated enforcer;
- (b) of any change in the name or purpose of a designated enforcer in respect of which he has given such notice;
- (c) of any change to the Community infringements in respect of which a designated enforcer is designated<sup>13</sup>.

A Community enforcer is a qualified entity for the purposes of the Injunctions Directive<sup>14</sup> (i) which is for the time being specified in the list published<sup>15</sup> in the Official Journal of the European Communities; but (ii) which is not a general enforcer, a designated enforcer or a CPC enforcer<sup>16</sup>. Each of the following, being bodies or persons designated by the Secretary of State under the relevant provision<sup>17</sup> of the CPC Regulation<sup>18</sup>, is a CPC enforcer<sup>19</sup>:

- (A) the OFT;
- (B) the Civil Aviation Authority<sup>20</sup>;
- (C) the Financial Services Authority<sup>21</sup>;
- (D) the Secretary of State for Health;
- (E) the Department of Health, Social Services and Public Safety in Northern Ireland;
- (F) the Office of Communications<sup>22</sup>;
- (G) the Department of Enterprise, Trade and Investment in Northern Ireland;
- (H) every local weights and measures authority in Great Britain;
- (I) the Independent Committee for the Supervision of Standards of the Telephone Information Services<sup>23</sup>.

1 References in the Enterprise Act 2002 Pt 8 (ss 210-236) to a general enforcer, a designated enforcer (see the text and notes 5-9) or a CPC enforcer (see the text and notes 17-23) are to be read, in the case of a person or body which is more than one kind of enforcer, as references to that person or body acting in its capacity as a general enforcer, designated enforcer or (as the case may be) CPC enforcer: s 235B (added by SI 2006/3363).

2 As to the OFT see PARAS 6-8.

3 As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20. As to the meaning of 'Great Britain' see PARA 395 note 2.

4 Enterprise Act 2002 s 213(1).

5 As to dual enforcers see note 1.

6 As to the Secretary of State see PARA 5.

7 As to the meaning of 'consumers' see PARA 339.

8 The Secretary of State may designate a public body only if he is satisfied that it is independent: Enterprise Act 2002 s 213(3). The designation of a body by virtue of s 213(3) is conclusive evidence for the purposes of any question arising under Pt 8 that the body is a public body: s 213(8).

The Secretary of State may designate a person or body which is not a public body only if the person or body (as the case may be) satisfies such criteria as the Secretary of State specifies by order: s 213(4). An order under s 213 may make different provision for different purposes (s 213(7)) and must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament (s 213(9)). As to the specified criteria see the Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, SI 2003/1399, arts 3, 4.

9 Enterprise Act 2002 s 213(2). An order under s 213 may designate an enforcer in respect of (1) all infringements; (2) infringements of such descriptions as are specified in the order: s 213(6). See also note 8. The following public bodies are designated under s 213(2) as designated enforcers in respect of all infringements: the Civil Aviation Authority (see note 20); the Director General of Electricity Supply for Northern Ireland; the Director General of Gas for Northern Ireland; the Office of Communications (see note 22); the Water Services Regulation Authority (see **WATER AND WATERWAYS** vol 100 (2009) PARA 109 et seq); the Gas and Electricity Markets Authority ('GEMA') (see **FUEL AND ENERGY** vol 19(1) (2007 Reissue) PARA 708); the Information Commissioner (see **CONFIDENCE AND DATA PROTECTION** vol 8(1) (2003 Reissue) PARA 518); and the Office of Rail Regulation (see **RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES** vol 39(1A) (Reissue) PARA 49 et seq): Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003, SI 2003/1399, art 5, Schedule (amended by SI 2003/3182, art 3, SI 2006/522; and by virtue of the Railways and Transport Safety Act 2003 Sch 3 para 4). The Financial Services Authority (see note 21) is also designated as a designated enforcer in respect of all infringements (Enterprise Act 2002 (Part 8) (Designation of the Financial Services Authority as a Designated Enforcer) Order 2004, SI 2004/935, art 2) as is the Consumers' Association (Enterprise Act 2002 (Part 8) (Designation of the Consumers' Association) Order 2005, SI 2005/917, art 2). As to the Consumers' Association see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 445.

10 As to the meaning of 'Community infringements' see PARA 341.

11 Enterprise Act 2002 s 213(10).

12 Ie notice under the Enterprise Act 2002 s 213(10): see the text and notes 10-11.

13 Enterprise Act 2002 s 213(11).

14 As to the meaning of 'Injunctions Directive' see PARA 339 note 11.

15 Ie in pursuance of EC Directive 98/27 of the European Parliament and of the Council on injunctions for the protection of consumers' interests (OJ L166, 11.6.98, p 51) art 4.3.

16 Enterprise Act 2002 s 213(5) (amended by SI 2006/3363).

17 Ie under EC Regulation 2006/2004 of the European Parliament and of the Council on co-operation between national authorities responsible for the enforcement of consumer protection laws (OJ L364, 9.12.2004, p 1) art 4(1) or 4(2). See also note 18.

18 The CPC Regulation is EC Regulation 2006/2004 of the European Parliament and of the Council on co-operation between national authorities responsible for the enforcement of consumer protection laws (OJ L364, 9.12.2004, p 1) as amended by the Unfair Commercial Practices Directive; and the Unfair Commercial Practices Directive is EC Directive 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (OJ L149, 11.6.2005, p 22): Enterprise Act 2002 s 235A (added by SI 2006/3363).

19 As to dual enforcers see note 1.

20 As to the Civil Aviation Authority see **AIR LAW** vol 2 (2008) PARA 50 et seq.

21 As to the Financial Services Authority see **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 4 et seq.

22 As to the Office of Communications ('OFCOM') see **TELECOMMUNICATIONS** vol 97 (2010) PARA 2 et seq.

23 Enterprise Act 2002 s 213(5A) (added by SI 2006/3363). As to the Independent Committee for the Supervision of Standards of the Telephone Information Services ('ICTIS') see **TELECOMMUNICATIONS** vol 97 (2010) PARA 91.

## **UPDATE**

### **342 Enforcers**

NOTE 15--Directive 98/27 replaced: European Parliament and EC Council Directive 2009/22 (OJ L110, 1.5.2009, p 33); references to the repealed directive should be construed as references to Directive 2009/22 and read in accordance with the correlation table in Annex III: art 9.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(i) In general/343. Advice and information to be published by the Office of Fair Trading.

### **343. Advice and information to be published by the Office of Fair Trading.**

As soon as reasonably practicable after 7 November 2002<sup>1</sup> the Office of Fair Trading (the 'OFT')<sup>2</sup> was to prepare and publish advice and information with a view to:

- (1) explaining the provisions of Part 8 of the Enterprise Act 2002<sup>3</sup> to persons who are likely to be affected by them; and
- (2) indicating how the OFT expects such provisions to operate<sup>4</sup>.

Advice or information published in pursuance of head (2) above may include advice or information about the factors which the OFT may take into account in considering how to exercise the functions conferred on it by Part 8 of that Act<sup>5</sup>.

The OFT may at any time publish revised or new advice or information<sup>6</sup>.

Advice or information published by the OFT under these provisions is to be published in such form and in such manner as it considers appropriate<sup>7</sup>.

In preparing advice or information under these provisions the OFT must consult such persons as it thinks are representative of persons affected by Part 8 of the Enterprise Act 2002<sup>8</sup>. If any proposed advice or information relates to a matter in respect of which another general or CPC enforcer<sup>9</sup> or a designated enforcer<sup>10</sup> may act the persons to be consulted must include that enforcer<sup>11</sup>.

The first advice and guidance prepared under these provisions was published in June 2003<sup>12</sup>.

<sup>1</sup> ie the date of the passing of the Enterprise Act 2002. The Enterprise Act 2002 received royal assent on 7 November 2002.

<sup>2</sup> As to the OFT see PARAS 6-8.

- 3       le the Enterprise Act 2002 Pt 8 (ss 210-236): see PARAS 339 et seq, 344 et seq.
- 4       Enterprise Act 2002 s 229(1). See the OFT's *Enforcement of Consumer Protection Legislation -- Guidance on Part 8 of the Enterprise Act 2002* (June 2003) OFT512.
- 5       Enterprise Act 2002 s 229(3).
- 6       Enterprise Act 2002 s 229(2).
- 7       Enterprise Act 2002 s 229(4).
- 8       Enterprise Act 2002 s 229(5).
- 9       As to the meanings of 'general enforcer' and 'CPC enforcer' see PARA 342.
- 10       As to the meaning of 'designated enforcer' see PARA 342.
- 11       Enterprise Act 2002 s 229(6) (amended by SI 2006/3363).
- 12       See note 4.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/344. Consultation.

## **(ii) Enforcement Procedure**

### **344. Consultation.**

An enforcer<sup>1</sup> must not make an application for an enforcement order<sup>2</sup> unless he has engaged in appropriate consultation<sup>3</sup> with the person against whom the enforcement order would be made, and with the Office of Fair Trading (the 'OFT')<sup>4</sup> if it is not the enforcer<sup>5</sup>. This requirement does not, however, apply if the OFT thinks that an application for an enforcement order should be made without delay<sup>6</sup>; and it ceases to apply:

- (1)       for the purposes of an application for an enforcement order at the end of the period of 14 days beginning with the day after the person against whom the enforcement order would be made receives a request for consultation from the enforcer<sup>7</sup>;
- (2)       for the purposes of an application for an interim enforcement order at the end of the period of seven days beginning with the day after the person against whom the interim enforcement order would be made receives a request for consultation from the enforcer<sup>8</sup>.

The Secretary of State may by order<sup>9</sup> make rules in relation to consultation under these provisions<sup>10</sup>. Rules have been so made in respect of the making and receipt of an enforcer's initial request for consultation to the person concerned<sup>11</sup>.

1       As to enforcers see PARA 342.

2       For these purposes, except in the Enterprise Act 2002 s 214(4) (see heads (1), (2) in the text), references to an enforcement order include references to an interim enforcement order: s 214(7). As to applications for an enforcement order see PARA 345; as to enforcement orders see PARA 346; and as to interim enforcement orders see PARA 347.

3 Appropriate consultation is consultation for the purpose of: (1) achieving the cessation of the infringement in a case where an infringement is occurring; (2) ensuring that there will be no repetition of the infringement in a case where the infringement has occurred; (3) ensuring that there will be no repetition of the infringement in a case where the cessation of the infringement is achieved under head (1) above; (4) ensuring that the infringement does not take place in the case of a Community infringement which the enforcer believes is likely to take place: Enterprise Act 2002 s 214(2). As to domestic infringements see PARA 340; and as to Community infringements see PARA 341.

4 As to the OFT's general functions see PARA 7. As to the OFT see PARAS 6-8.

5 Enterprise Act 2002 s 214(1).

6 Enterprise Act 2002 s 214(3).

7 Enterprise Act 2002 s 214(4)(a).

8 Enterprise Act 2002 s 214(4)(b).

9 As to the Secretary of State see PARA 5. The power to make an order under the Enterprise Act 2002 s 214 must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 214(6).

10 Enterprise Act 2002 s 214(5). In the exercise of this power, the Enterprise Act 2002 (Part 8 Request for Consultation) Order 2003, SI 2003/1375, which lays down rules in respect of the making and receipt of an enforcer's initial request for consultation to the person concerned, has been made.

11 See note 10.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/345. Applications.

### **345. Applications.**

An application for an enforcement order<sup>1</sup> must name the person the enforcer<sup>2</sup> thinks:

- (1) has engaged or is engaging in conduct which constitutes a domestic or a Community infringement<sup>3</sup>; or
- (2) is likely to engage in conduct which constitutes a Community infringement<sup>4</sup>.

A general enforcer<sup>5</sup> may make an application for an enforcement order in respect of any infringement<sup>6</sup>; a designated enforcer<sup>7</sup> may make an application for an enforcement order in respect of an infringement to which his designation relates<sup>8</sup>; a Community enforcer<sup>9</sup> may make an application for an enforcement order in respect of a Community infringement<sup>10</sup>; and a CPC enforcer<sup>11</sup> may make an application for an enforcement order in respect of a Community infringement<sup>12</sup>.

If the Office of Fair Trading (the 'OFT')<sup>13</sup> believes that an enforcer other than the OFT intends to apply for an enforcement order, then in such a case the OFT may direct that if an application in respect of a particular infringement is to be made it must be made:

- (a) only by the OFT; or
- (b) only by such other enforcer as the OFT directs<sup>14</sup>;

but these provisions<sup>15</sup> do not prevent an application for an enforcement order being made by a Community enforcer<sup>16</sup>. If the OFT directs that only it may make an application, that does not



prevent the OFT or any enforcer from accepting an undertaking<sup>17</sup> or prevent the OFT from taking such other steps it thinks appropriate (apart from making an application) for the purpose of securing that the infringement is not committed, continued or repeated<sup>18</sup>. The OFT may vary or withdraw a direction so given<sup>19</sup> and must take such steps as it thinks appropriate to bring a direction (or a variation or withdrawal of a direction) to the attention of enforcers it thinks may be affected by it<sup>20</sup>.

If the person against whom the order is sought carries on business or has a place of business in England and Wales or Northern Ireland, the High Court or a county court has jurisdiction to make an enforcement order<sup>21</sup>. If an application for an enforcement order is made by a Community enforcer, the court may examine whether the purpose of the enforcer<sup>22</sup> justifies its making the application<sup>23</sup>; and if the court thinks that the purpose of the Community enforcer does not justify its making the application the court may refuse the application on that ground alone<sup>24</sup>.

An enforcer which is not the OFT must notify the OFT of the result of an application<sup>25</sup> under the above provisions<sup>26</sup>.

1 For the purposes of the Enterprise Act 2002 ss 215, 216 (see the text and notes 2-26), references to an enforcement order include references to an interim enforcement order: s 214(7). As to enforcement orders see PARA 346; and as to interim enforcement orders see PARA 347.

2 As to enforcers see PARA 342.

3 As to the meaning of 'domestic infringement' see PARA 340; and as to the meaning of 'Community infringement' see PARA 341.

4 Enterprise Act 2002 s 215(1).

5 As to the meaning of 'general enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

6 Enterprise Act 2002 s 215(2).

7 As to the meaning of 'designated enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

8 Enterprise Act 2002 s 215(3).

9 As to the meaning of 'Community enforcer' see PARA 342.

10 Enterprise Act 2002 s 215(4).

11 As to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

12 Enterprise Act 2002 s 215(4A) (added by SI 2006/3363).

13 As to the OFT's general functions see PARA 7. As to the OFT see PARAS 6-8.

14 Enterprise Act 2002 s 216(1), (2).

15 In the Enterprise Act 2002 s 216: see the text and notes 13-14, 16-20.

16 Enterprise Act 2002 s 216(6).

17 In an undertaking under the Enterprise Act 2002 s 219: see PARA 349.

18 Enterprise Act 2002 s 216(3).

19 Enterprise Act 2002 s 216(4).

20 Enterprise Act 2002 s 216(5).

21 Enterprise Act 2002 s 215(5)(a). If the person against whom the order is sought carries on business or has a place of business in Scotland, the Court of Session or the sheriff has jurisdiction to make an enforcement order: s 215(5)(b).

22 The purpose of a Community enforcer must be construed by reference to the Injunctions Directive: Enterprise Act 2002 s 215(8). As to the meaning of 'Injunctions Directive' see PARA 339 note 11.

23 Enterprise Act 2002 s 215(6).

24 Enterprise Act 2002 s 215(7).

25 Ie an application under the Enterprise Act 2002 s 215: see the text and notes 1-12, 21-26.

26 Enterprise Act 2002 s 215(9).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/346. Enforcement orders made, or undertakings accepted by, the court.

### **346. Enforcement orders made, or undertakings accepted by, the court.**

The following provisions apply:

- (1) if an application for an enforcement order is made<sup>1</sup> and the court<sup>2</sup> finds that the person named in the application has engaged in conduct which constitutes the infringement<sup>3</sup>;
- (2) if such an application is made in relation to a Community infringement<sup>4</sup> and the court finds that the person named in the application is likely to engage in conduct which constitutes the infringement<sup>5</sup>.

If these provisions apply the court may make an enforcement order against the person<sup>6</sup>. In considering whether to make an enforcement order the court must have regard to whether the person named in the application has (a) given an undertaking<sup>7</sup> in respect of certain specified conduct<sup>8</sup>; (b) has failed to comply with the undertaking<sup>9</sup>.

An enforcement order must indicate the nature of the conduct to which the finding under head (1) or head (2) relates, and must direct the person to comply with the requirements set out in heads (i) to (iii) below<sup>10</sup>. A person complies with those requirements if he:

- (i) does not continue or repeat the conduct;
- (ii) does not engage in such conduct in the course of his business or another business;
- (iii) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has<sup>11</sup> a special relationship<sup>12</sup>;

but head (i) above does not apply in the case of a finding under head (2) above<sup>13</sup>.

An enforcement order may require a person against whom the order is made to publish, in such form and manner and to such extent as the court thinks appropriate for the purpose of eliminating any continuing effects of the infringement, (A) the order; (B) a corrective statement<sup>14</sup>.

If the court makes a finding under head (1) or head (2) above it may accept an undertaking by the person either to comply with heads (i) to (iii) above, or to take steps which the court believes will secure that he so complies<sup>15</sup>; and such an undertaking may include a further undertaking by the person to publish, in such form and manner and to such extent as the court

thinks appropriate for the purpose of eliminating any continuing effects of the infringement, (aa) the terms of the undertaking; (bb) a corrective statement<sup>16</sup>. If the court makes a finding under head (1) or head (2) above, and accepts such an undertaking, it must not make an enforcement order in respect of the infringement to which the undertaking relates<sup>17</sup>.

An enforcement order made by a court in one part of the United Kingdom<sup>18</sup> has effect in any other part of the United Kingdom as if made by a court in that part<sup>19</sup>.

1       Ie an application under the Enterprise Act 2002 s 215: see PARA 345.

2       As to the court with jurisdiction to make an enforcement order see PARA 345.

3       Enterprise Act 2002 s 217(1). As to domestic and Community infringements see PARAS 340, 341. It has been held in Scotland that the conduct of a trader before and after 20 June 2003 (when the Enterprise Act 2002 Pt 8 (ss 210-236) came into force) is relevant to the question of whether an enforcement order ought to be granted and that to that extent Pt 8 is intended to have retrospective effect: see *Office of Fair Trading v MB Designs (Scotland) Ltd, Martin Black and Paul Bradley Bett* [2005] CSOH 85 at [23], 2005 SCLR 894 at [23].

4       As to the meaning of 'Community infringement' see PARA 341.

5       Enterprise Act 2002 s 217(2).

6       Enterprise Act 2002 s 217(3).

7       Ie an undertaking under the Enterprise Act 2002 s 219: see PARA 349.

8       Ie conduct such as is mentioned in the Enterprise Act 2002 s 219(3): see PARA 349.

9       Enterprise Act 2002 s 217(4).

10      Enterprise Act 2002 s 217(5).

11      Ie within the meaning of the Enterprise Act 2002 s 222(3): see PARA 352.

12      Enterprise Act 2002 s 217(6). If an order is made as mentioned in s 222(5) or an undertaking is accepted as mentioned in s 222(6) (see PARA 352), s 217(6) is substituted by s 222(9): see PARA 352 note 8.

13      Enterprise Act 2002 s 217(7).

14      Enterprise Act 2002 s 217(8).

15      Enterprise Act 2002 s 217(9).

16      Enterprise Act 2002 s 217(10).

17      Enterprise Act 2002 s 217(11).

18      As to the meaning of 'United Kingdom' see PARA 401 note 1.

19      Enterprise Act 2002 s 217(12).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/347. Interim enforcement orders made or undertakings accepted by the court.

### **347. Interim enforcement orders made or undertakings accepted by the court.**

The court<sup>1</sup> may make an interim enforcement order against a person named in the application for the order<sup>2</sup> if it appears to the court:

- (1) that it is alleged that the person is engaged in conduct which constitutes a domestic or Community infringement<sup>3</sup> or is likely to engage in conduct which constitutes a Community infringement<sup>4</sup>;
- (2) that if the application had been an application for an enforcement order<sup>5</sup> it would be likely to be granted<sup>6</sup>;
- (3) that it is expedient that the conduct is prohibited or prevented, as the case may be, immediately<sup>7</sup>; and
- (4) if no notice of the application has been given to the person named in the application, that it is appropriate to make an interim enforcement order without notice<sup>8</sup>.

An interim enforcement order must indicate the nature of the alleged conduct, and direct the person to comply with the requirements set out in heads (a) to (c) below<sup>9</sup>. A person complies with those requirements if he:

- (a) does not continue or repeat the conduct;
- (b) does not engage in such conduct in the course of his business or another business;
- (c) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has<sup>10</sup> a special relationship<sup>11</sup>;

but head (a) above does not apply in so far as the application is made in respect of an allegation that the person is likely to engage in conduct which constitutes a Community infringement<sup>12</sup>.

An application for an interim enforcement order against a person may be made at any time before an application for an enforcement order against the person in respect of the same conduct is determined<sup>13</sup>. An application for an interim enforcement order must refer to all matters which are known to the applicant, and which are material to the question whether or not the application is granted<sup>14</sup>. If an application for an interim enforcement order is made without notice, the application must state why no notice has been given<sup>15</sup>.

The court may vary or discharge an interim enforcement order on the application of:

- (i) the enforcer<sup>16</sup> who applied for the order;
- (ii) the person against whom it is made<sup>17</sup>.

An interim enforcement order against a person is discharged on the determination of an application for an enforcement order made against the person in respect of the same conduct<sup>18</sup>.

If it appears to the court as mentioned in heads (1) to (3) above the court may, instead of making an interim enforcement order, accept an undertaking from the person named in the application either to comply with heads (a) to (c) above, or to take steps which the court believes will secure that he so complies<sup>19</sup>.

An interim enforcement order made by a court in one part of the United Kingdom<sup>20</sup> has effect in any other part of the United Kingdom as if made by a court in that part<sup>21</sup>.

1 As to the courts with jurisdiction to make interim enforcement orders see PARA 345.

2 As to applications see PARA 345.

3 As to the meaning of 'domestic infringement' see PARA 340; and as to the meaning of 'Community infringement' see PARA 341.

4 Enterprise Act 2002 s 218(1)(a).

5 As to enforcement orders see PARA 346.

6 Enterprise Act 2002 s 218(1)(b). It has been held in Scotland that 'likely' in the Enterprise Act 2002 s 218(1)(b) means 'more likely than not': see *Office of Fair Trading v MB Designs (Scotland) Ltd, Martin Black and Paul Bradley Bett* [2005] CSOH 85 at [21], 2005 SCLR 894 at [21].

7 Enterprise Act 2002 s 218(1)(c).

8 Enterprise Act 2002 s 218(1)(d).

9 Enterprise Act 2002 s 218(2).

10 le within the meaning of the Enterprise Act 2002 s 222(3): see PARA 352.

11 Enterprise Act 2002 s 218(3). If an order is made as mentioned in s 222(5) or an undertaking is accepted as mentioned in s 222(6) (see PARA 352), s 218(3) is substituted by s 222(9): see PARA 352 note 8.

12 Enterprise Act 2002 s 218(4).

13 Enterprise Act 2002 s 218(5).

14 Enterprise Act 2002 s 218(6).

15 Enterprise Act 2002 s 218(7).

16 As to enforcers see PARA 342.

17 Enterprise Act 2002 s 218(8).

18 Enterprise Act 2002 s 218(9).

19 Enterprise Act 2002 s 218(10).

20 As to the meaning of 'United Kingdom' see PARA 401 note 1.

21 Enterprise Act 2002 s 218(11).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/348. Unfair commercial practices: substantiation of claims.

### **348. Unfair commercial practices: substantiation of claims.**

Where an application<sup>1</sup> for an enforcement order<sup>2</sup> or for an interim enforcement order<sup>3</sup> is made in respect of a Community infringement involving a contravention of the Unfair Commercial Practices Directive<sup>4</sup>, then for the purposes of considering the application the court<sup>5</sup> may require the person named in the application to provide evidence as to the accuracy of any factual claim made as part of a commercial practice<sup>6</sup> of that person if, taking into account the legitimate interests of that person and any other party to the proceedings, it appears appropriate in the circumstances<sup>7</sup>. If, having been so required to provide evidence as to the accuracy of a factual claim, a person either fails to provide such evidence, or provides evidence as to the accuracy of the factual claim that the court considers inadequate, the court may consider that the factual claim is inaccurate<sup>8</sup>.

- 1 As to applications see PARA 345.
- 2 As to enforcement orders see PARA 346.
- 3 As to interim enforcement orders see PARA 347.
- 4 It is a contravention of EC Directive 2005/29 of the European Parliament and of the Council concerning unfair business-to-consumer commercial practices in the internal market (OJ L149, 11.6.2005, p 22).
- 5 As to the courts having jurisdiction to consider the application see PARA 345.
- 6 For these purposes, 'commercial practice' means any act, omission, course of conduct, representation or commercial communication (including advertising and marketing) by a trader, which is directly connected with the promotion, sale or supply of a product to or from consumers, whether occurring before, during or after a commercial transaction (if any) in relation to a product: Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277, reg 2(1) (definition applied by the Enterprise Act 2002 s 218A(4) (s 218A added by SI 2008/1277)).
- 7 Enterprise Act 2002 s 218A(1), (2) (as added: see note 6).
- 8 Enterprise Act 2002 s 218A(3) (as added: see note 6).

## UPDATE

### 348 Unfair commercial practices: substantiation of claims

NOTE 4--See Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV; Galatea BVBA v Sanoma Magazines Belgium NV* [2009] All ER (D) 170 (Apr), [2009] CMLR 697, ECJ.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/349. Undertakings which may be accepted by the enforcer.

### 349. Undertakings which may be accepted by the enforcer.

The following provisions apply if an enforcer<sup>1</sup> has power to make an application<sup>2</sup> for an enforcement order or an interim enforcement order<sup>3</sup>.

In such a case the enforcer may accept from a person who the enforcer believes:

- (1) has engaged in conduct which constitutes an infringement<sup>4</sup>;
- (2) is engaging in such conduct;
- (3) is likely to engage in conduct which constitutes a Community infringement<sup>5</sup>,

an undertaking that the person will comply with the requirements set out in heads (a) to (c) below<sup>6</sup>. A person complies with those requirements if he:

- (a) does not continue or repeat the conduct;
- (b) does not engage in such conduct in the course of his business or another business;
- (c) does not consent to or connive in the carrying out of such conduct by a body corporate with which he has<sup>7</sup> a special relationship<sup>8</sup>;

but head (a) above does not apply in the case of an undertaking given by a person in so far as an undertaking may be accepted from him by virtue of head (3) above<sup>9</sup>.

A CPC enforcer<sup>10</sup> who has accepted an undertaking under these provisions may either accept a further undertaking from the person concerned to publish the terms of the undertaking<sup>11</sup> or take steps itself to publish the undertaking<sup>12</sup>. In each case the undertaking must be published in such form and manner and to such extent as the CPC enforcer thinks appropriate for the purpose of eliminating any continuing effects of the Community infringement<sup>13</sup>.

If an enforcer accepts an undertaking under these provisions it must notify the Office of Fair Trading (the 'OFT')<sup>14</sup> of the terms of the undertaking and of the identity of the person who gave it<sup>15</sup>.

- 1 As to enforcers see PARA 342.
- 2 Ie an application under the Enterprise Act 2002 s 215: see PARA 345.
- 3 See the Enterprise Act 2002 s 219(1). As to enforcement orders see PARA 346; and as to interim enforcement orders see PARA 347.
- 4 As to domestic infringements see PARA 340; and as to Community infringements see PARA 341.
- 5 As to the meaning of 'community infringement' see PARA 341.
- 6 See the Enterprise Act 2002 s 219(2), (3).
- 7 Ie within the meaning of the Enterprise Act 2002 s 222(3): see PARA 352.
- 8 Enterprise Act 2002 s 219(4). If an undertaking is accepted as mentioned in s 222(7) (see PARA 352), s 219(4) is substituted by s 222(9): see PARA 352 note 8.
- 9 See the Enterprise Act 2002 s 219(5).
- 10 As to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.
- 11 Enterprise Act 2002 s 219(5A)(a) (s 219(5A), (5B) added by SI 2006/3363).
- 12 Enterprise Act 2002 s 219(5A)(b) (as added: see note 11).
- 13 Enterprise Act 2002 s 219(5B) (as added: see note 11).
- 14 As to the OFT see PARAS 6-8.
- 15 Enterprise Act 2002 s 219(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/350. Further proceedings.

### **350. Further proceedings.**

The following provisions apply if the court<sup>1</sup> makes an enforcement order<sup>2</sup>, makes an interim enforcement order<sup>3</sup> or accepts<sup>4</sup> an undertaking<sup>5</sup>. In such a case the Office of Fair Trading (the 'OFT')<sup>6</sup> has the same right to apply to the court in respect of a failure to comply with the order or undertaking as the enforcer<sup>7</sup> who made the application for the order<sup>8</sup>. An application to the court in respect of a failure to comply with an undertaking may include an application for an enforcement order or for an interim enforcement order<sup>9</sup>. If the court finds that an undertaking is

not being complied with it may make an enforcement order or an interim enforcement order, instead of making any other order it has power to make<sup>10</sup>.

If an enforcer which is not the OFT makes an application in respect of the failure of a person to comply with an enforcement order, an interim enforcement order or an undertaking<sup>11</sup> the enforcer must notify the OFT of the application and of any order made by the court on the application<sup>12</sup>.

- 1 As to the court having jurisdiction see PARA 345.
- 2 Ie under the Enterprise Act 2002 s 217: see PARA 346.
- 3 Ie under the Enterprise Act 2002 s 218: see PARA 347.
- 4 Ie under the Enterprise Act 2002 s 217 or s 218: see PARAS 346, 347.
- 5 Enterprise Act 2002 s 220(1).
- 6 As to the OFT see PARAS 6-8.
- 7 As to enforcers see PARA 342.
- 8 Enterprise Act 2002 s 220(2).
- 9 Enterprise Act 2002 s 220(3). In the case of an application for an enforcement order or for an interim enforcement order as mentioned in s 220(3), ss 214, 216 (see PARAS 344, 345) must be ignored and s 215 (see PARA 345), s 217 (see PARA 346) or s 218 (see PARA 347) (as the case may be) applies subject to the following modifications: (1) s 215(1)(b) must be ignored; (2) s 215(5) must be ignored and the application must be made to the court which accepted the undertaking; (3) s 217(9)-(11) must be ignored; (4) s 218(10) must be ignored: s 220(5).
- 10 Enterprise Act 2002 s 220(4).
- 11 Ie an undertaking given under the Enterprise Act 2002 s 217 or s 218: see PARAS 346, 347.
- 12 Enterprise Act 2002 s 220(6).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/351. Proceedings in relation to Community infringements.

### **351. Proceedings in relation to Community infringements.**

Every general enforcer<sup>1</sup> and every designated enforcer<sup>2</sup> which is a public body<sup>3</sup> has power to take proceedings in EEA states<sup>4</sup> other than the United Kingdom<sup>5</sup> for the cessation or prohibition of a Community infringement<sup>6</sup>.

Every general enforcer, every designated enforcer and every CPC enforcer<sup>7</sup> may co-operate with a Community enforcer<sup>8</sup>:

- (1) for the purpose of bringing proceedings in EEA states other than the United Kingdom for the cessation or prohibition of a Community infringement<sup>9</sup>;
- (2) in connection with the exercise by the Community enforcer of its functions under Part 8<sup>10</sup> of the Enterprise Act 2002<sup>11</sup>.

1 As to the meaning of 'general enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.



- 2 As to the meaning of 'designated enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.
- 3 The designation of a body by virtue of the Enterprise Act 2002 s 213(3) (see PARA 342) is conclusive evidence for the purposes of any question arising under Pt 8 (ss 210-236) that the body is a public body: s 213(8).
- 4 An EEA state is a state which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2 May 1992 as adjusted by the Protocol signed at Brussels on 17 March 1993: Enterprise Act 2002 s 221(5).
- 5 As to the meaning of 'United Kingdom' see PARA 401 note 1.
- 6 Enterprise Act 2002 s 221(1), (2). As to the meaning of 'Community infringement' see PARA 341.
- 7 As to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.
- 8 As to the meaning of 'Community enforcer' see PARA 342.
- 9 Ie for the purpose of bringing proceedings mentioned in the Enterprise Act 2002 s 221(2): see the text and notes 4-6.
- 10 Ie under the Enterprise Act 2002 Pt 8 (ss 210-236): see PARAS 339 et seq, 352 et seq.
- 11 Enterprise Act 2002 s 221(3), (4) (s 221(3) amended by SI 2006/3363).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/352. Bodies corporate.

### **352. Bodies corporate.**

If the person whose conduct constitutes a domestic infringement<sup>1</sup> or a Community infringement<sup>2</sup> is a body corporate, then if the conduct takes place with the consent or connivance of a person (an 'accessory') who has a special relationship with the body corporate, the consent or connivance is also conduct which constitutes the infringement<sup>3</sup>. For these purposes, a person has a special relationship with a body corporate if he is a controller<sup>4</sup> of the body corporate, or a director, manager, secretary or other similar officer of the body corporate or a person purporting to act in such a capacity<sup>5</sup>. An enforcement order<sup>6</sup> or an interim enforcement order<sup>7</sup> may be made against an accessory in respect of an infringement whether or not such an order is made against the body corporate<sup>8</sup>; and the court<sup>9</sup> may accept an undertaking<sup>10</sup> from an accessory in respect of an infringement whether or not it accepts such an undertaking from the body corporate<sup>11</sup>. An enforcer<sup>12</sup> may also accept an undertaking<sup>13</sup> from an accessory in respect of an infringement whether or not it accepts such an undertaking from the body corporate<sup>14</sup>.

If a court makes an enforcement order or an interim enforcement order against a body corporate and:

- (1) at the time the order is made the body corporate is a member of a group of interconnected bodies corporate<sup>15</sup>;
- (2) at any time when the order is in force the body corporate becomes a member of a group of interconnected bodies corporate; or
- (3) at any time when the order is in force a group of interconnected bodies corporate of which the body corporate is a member is increased by the addition of one or more further members,

the court may direct that the order is binding upon all of the members of the group as if each of them were the body corporate against which the order is made<sup>16</sup>.

1 As to the meaning of 'domestic infringement' see PARA 340.

2 As to the meaning of 'Community infringement' see PARA 341.

3 Enterprise Act 2002 s 222(1), (2).

4 A person is a controller of a body corporate if (1) the directors of the body corporate or of another body corporate which is its controller are accustomed to act in accordance with the person's directions or instructions; or (2) either alone or with an associate or associates he is entitled to exercise or control the exercise of one third or more of the voting power at any general meeting of the body corporate or of another body corporate which is its controller: Enterprise Act 2002 s 222(4). A person is an associate of an individual if (a) he is the spouse or civil partner of the individual; (b) he is a relative of the individual; (c) he is a relative of the individual's spouse or civil partner; (d) he is the spouse or civil partner of a relative of the individual; (e) he is the spouse or civil partner of a relative of the individual's spouse or civil partner; (f) he lives in the same household as the individual otherwise than merely because he or the individual is the other's employer, tenant, lodger or boarder; (g) he is a relative of a person who is an associate of the individual by virtue of head (f) above; (h) he has at some time in the past fallen within any of heads (a)-(g) above: Enterprise Act 2002 s 222(10) (amended by the Civil Partnership Act 2004 Sch 27 para 169). A person is also an associate of (i) an individual with whom he is in partnership; (ii) an individual who is an associate of the individual mentioned in head (i) above; (iii) a body corporate if he is a controller of it or he is an associate of a person who is a controller of the body corporate: Enterprise Act 2002 s 222(11). A body corporate is an associate of another body corporate if (A) the same person is a controller of both; (B) a person is a controller of one and persons who are his associates are controllers of the other; (C) a person is a controller of one and he and persons who are his associates are controllers of the other; (D) a group of two or more persons is a controller of each company and the groups consist of the same persons; (E) a group of two or more persons is a controller of each company and the groups may be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person of whom he is an associate: s 222(12). A relative is a brother, sister, uncle, aunt, nephew, niece, lineal ancestor or lineal descendant: s 222(13).

5 Enterprise Act 2002 s 222(3).

6 As to enforcement orders see PARA 346.

7 As to interim enforcement orders see PARA 347.

8 Enterprise Act 2002 s 222(5). Section 222(9) applies if (1) an order is made as mentioned in s 222(5); or (2) an undertaking is accepted as mentioned in s 222(6) or (7) (see the text and notes 9-14): s 222(8). In such a case for s 217(6) (see PARA 346), s 218(3) (see PARA 347) or s 219(4) (see PARA 349) (as the case may be) there is substituted the following provision: 'A person complies with this subsection if he (a) does not continue or repeat the conduct; (b) does not in the course of any business carried on by him engage in conduct such as that which constitutes the infringement committed by the body corporate mentioned in s 222(1); (c) does not consent to or connive in the carrying out of such conduct by another body corporate with which he has a special relationship (within the meaning of s 222(3)).': s 222(9).

9 As to the court having jurisdiction see PARA 345.

10 Ie under the Enterprise Act 2002 s 217(9) or s 218(10): see PARAS 346, 347.

11 Enterprise Act 2002 s 222(6). See further s 222(8), (9), cited in note 8.

12 As to enforcers see PARA 342.

13 Ie under the Enterprise Act 2002 s 219: see PARA 349.

14 Enterprise Act 2002 s 222(7). See further s 222(8), (9), cited in note 8.

15 A group of interconnected bodies corporate is a group consisting of two or more bodies corporate all of whom are interconnected with each other: Enterprise Act 2002 s 223(3). Any two bodies corporate are interconnected if one of them is a subsidiary of the other, or if both of them are subsidiaries of the same body corporate: s 223(4). 'Subsidiary' must be construed in accordance with the Companies Act 1985 s 736 (repealed by the Companies Act 2006 Sch 16 and replaced by the Companies Act 2006 s 1159, with effect from 1 October 2009): Enterprise Act 2002 s 223(5).

16 Enterprise Act 2002 s 223(1), (2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(ii) Enforcement Procedure/353. Evidence.

### **353. Evidence.**

With the exception of proceedings for an offence of obstructing, or failing to co-operate with, powers of entry<sup>1</sup>, proceedings under Part 8 of the Enterprise Act 2002<sup>2</sup> are civil proceedings for the purposes of the provisions of the law of evidence<sup>3</sup> making convictions admissible as evidence in civil proceedings<sup>4</sup>.

In proceedings under that Part, any finding by a court in civil proceedings that a specified act or omission<sup>5</sup> has occurred is admissible as evidence that the act or omission occurred<sup>6</sup> and, unless the contrary is proved, is sufficient evidence that the act or omission occurred<sup>7</sup>; but this does not apply to any finding which has been reversed on appeal<sup>8</sup> or which has been varied on appeal so as to negative it<sup>9</sup>.

1 Enterprise Act 2002 s 228(4) (added by SI 2006/3363). The offence referred to in the text is an offence under the Enterprise Act 2002 s 227E (see PARAS 355-357): s 228(4) (as so added).

2 I.e. proceedings under the Enterprise Act 2002 Pt 8 (ss 210-236): see PARAS 339 et seq, 354 et seq.

3 I.e. for the purposes of the Civil Evidence Act 1968 s 11 (see **CIVIL PROCEDURE** vol 12 (2009) PARA 1208) and the corresponding provisions in Scotland and Northern Ireland.

4 Enterprise Act 2002 s 228(1).

5 I.e. an act or omission mentioned in the Enterprise Act 2002 s 211(2)(b), (c) or (d) (see PARA 340) or s 212(1) (see PARA 341): s 228(2).

6 Enterprise Act 2002 s 228(2)(a).

7 Enterprise Act 2002 s 228(2)(b).

8 Enterprise Act 2002 s 228(3)(a).

9 Enterprise Act 2002 s 228(3)(b).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(iii) Information/354. Information required by the Office of Fair Trading and other enforcers.

### **(iii) Information**

#### **354. Information required by the Office of Fair Trading and other enforcers.**

The Office of Fair Trading (the 'OFT')<sup>1</sup> may for any of the purposes mentioned in heads (1) to (4) below give notice to any person requiring the person to provide it with the information specified in the notice<sup>2</sup>. Those purposes are:

- (1) to enable the OFT to exercise or to consider whether to exercise any function it has under Part 8 of the Enterprise Act 2002<sup>3</sup>;
- (2) to enable a designated enforcer<sup>4</sup> which is not a public body<sup>5</sup> to consider whether to exercise any function it has under Part 8 of that Act;
- (3) to enable a Community enforcer<sup>6</sup> to consider whether to exercise any function it has under that Part;
- (4) to ascertain whether a person has complied with or is complying with an enforcement order<sup>7</sup>, an interim enforcement order<sup>8</sup> or an undertaking given to the court<sup>9</sup> or to an enforcer<sup>10</sup>.

Every general enforcer<sup>11</sup> other than the OFT, every designated enforcer which is a public body<sup>12</sup> and every CPC enforcer<sup>13</sup> other than the OFT may, for any of the purposes mentioned in heads (a) and (b) below, give notice to any person requiring the person to provide the enforcer with the information specified in the notice<sup>14</sup>. Those purposes are:

- (a) to enable the enforcer to exercise or to consider whether to exercise any function it has under Part 8 of the Enterprise Act 2002;
- (b) to ascertain whether a person has complied with or is complying with an enforcement order or an interim enforcement order made on the application<sup>15</sup> of the enforcer, or an undertaking given to the court<sup>16</sup> following such an application, or an undertaking given<sup>17</sup> to the enforcer<sup>18</sup>.

A notice given under the above provisions<sup>19</sup> must be in writing<sup>20</sup> and must specify the purpose for which the information is required<sup>21</sup>. If the purpose is as mentioned in head (1), head (2), head (3) or head (a) above, the notice must also specify the function concerned<sup>22</sup>. A notice may specify the time within which and manner in which it is to be complied with<sup>23</sup> and may require the production of documents or any description of documents<sup>24</sup>. An enforcer may take copies of any documents produced in compliance with such a requirement<sup>25</sup>. A notice may also specify the form in which information is to be provided<sup>26</sup>. A notice must not, however, require a person to provide any information or produce any document which he would be entitled to refuse to provide or produce in proceedings in the High Court on the grounds of legal professional privilege<sup>27</sup>. A notice may be varied or revoked by a subsequent notice<sup>28</sup>.

If a person fails to comply with a notice given under the above provisions<sup>29</sup> the enforcer who gave the notice may make an application to a court with jurisdiction to make an enforcement order<sup>30</sup>; and if it appears to the court that the person to whom the notice was given has failed to comply with the notice the court may make an order<sup>31</sup> which may:

- (i) require the person to whom the notice was given to do anything the court thinks it is reasonable for him to do for any of the purposes mentioned in heads (1) to (4) or heads (a) to (b) above, as the case may be, to ensure that the notice is complied with<sup>32</sup>;
- (ii) require the person to meet all the costs or expenses of the application<sup>33</sup>.

1 As to the OFT see PARAS 6-8.

2 Enterprise Act 2002 s 224(1).

3 Ie under the Enterprise Act 2002 Pt 8 (ss 210-236): see PARAS 339 et seq, 355 et seq.

4 As to the meaning of 'designated enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

5       le a designated enforcer to which the Enterprise Act 2002 s 225 (see the text and notes 11-18) does not apply: s 224(2)(b). The designation of a body by virtue of s 213(3) (see PARA 342) is conclusive evidence for the purposes of any question arising under Pt 8 that the body is a public body: s 213(8).

6       As to the meaning of 'Community enforcer' see PARA 342.

7       As to enforcement orders see PARA 346.

8       As to interim enforcement orders see PARA 347.

9       le an undertaking given under the Enterprise Act 2002 s 217(9) (see PARA 346) or s 218(10) (see PARA 347).

10       See the Enterprise Act 2002 s 224(2). An undertaking may be given to an enforcer under the Enterprise Act 2002 s 219: see PARA 349.

11       As to the meaning of 'general enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

12       As to whether a designated enforcer is a public body see note 5.

13       As to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

14       Enterprise Act 2002 s 225(1).

15       As to applications see PARA 345.

16       See note 9.

17       le an undertaking given under the Enterprise Act 2002 s 219: see PARA 349.

18       Enterprise Act 2002 s 225(2).

19       le a notice given under the Enterprise Act 2002 s 224 or s 225: see the text and notes 1-18.

20       'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly: Interpretation Act 1978 Sch 1.

21       Enterprise Act 2002 s 226(1), (2).

22       Enterprise Act 2002 s 226(3).

23       Enterprise Act 2002 s 226(4).

24       Enterprise Act 2002 s 226(5).

25       Enterprise Act 2002 s 226(6).

26       Enterprise Act 2002 s 226(6A) (added by SI 2006/3363).

27       Enterprise Act 2002 s 226(8)(a). As to legal professional privilege see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 507, 511. Nor must it require a person to provide any information or produce any document which he would be entitled to refuse to provide or produce in proceedings in the Court of Session on the grounds of confidentiality of communications: s 226(8)(b).

28       Enterprise Act 2002 s 226(7).

29       Se note 19.

30       See the Enterprise Act 2002 s 227(1), (6). As to the courts with jurisdiction to make an enforcement order see PARA 345.

31       Enterprise Act 2002 s 227(2).

32       Enterprise Act 2002 s 227(3).

33       Enterprise Act 2002 s 227(4). If the person is a company or association the court in proceeding under s 227(4) may require any officer of the company or association who is responsible for the failure to meet the costs

or expenses (s 227(5)); and for these purposes an officer of a company is a person who is a director, manager, secretary or other similar officer of the company (s 227(6)).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(iii) Information/355. Power to enter premises without warrant.

### **355. Power to enter premises without warrant.**

An officer of a CPC enforcer<sup>1</sup> who reasonably suspects:

- (1) that there has been, or is likely to be, a Community infringement<sup>2</sup> may for any purpose relating to the functions of the CPC enforcer under Part 8 of the Enterprise Act 2002<sup>3</sup> enter any premises<sup>4</sup> to investigate whether there has been, or is likely to be, such an infringement<sup>5</sup>;
- (2) that there is, or has been, a failure to comply with a relevant enforcement measure<sup>6</sup> may for any purpose relating to the functions of the CPC enforcer under Part 8 of that Act enter any premises to investigate whether a person is complying with, or has complied with, the relevant enforcement measure<sup>7</sup>.

An appropriate notice must be given<sup>8</sup> to the occupier<sup>9</sup> of the premises before an officer of a CPC enforcer enters them under head (1) and head (2) above<sup>10</sup>. An appropriate notice is a notice in writing<sup>11</sup> given by an officer of a CPC enforcer which:

- (a) gives at least two working days<sup>12</sup> notice of entry on the premises;
- (b) sets out why the entry is necessary; and
- (c) indicates the nature of the offence<sup>13</sup> of obstructing, or failing to co-operate with, powers of entry<sup>14</sup>.

The requirement to give an appropriate notice does not, however, apply if such a notice cannot be given despite all reasonably practicable steps having been taken to do so<sup>15</sup>. In that case, the officer entering the premises must produce to any occupier that he finds on the premises a document setting out why the entry is necessary and indicating the nature of the offence referred to in head (c) above<sup>16</sup>.

In all cases, the officer entering the premises must produce to any occupier evidence of his identity and, in the case of an authorised officer of a CPC enforcer<sup>17</sup>, his authorisation, if asked to do so<sup>18</sup>. An officer of a CPC enforcer who enters premises by virtue of the above provisions may only do so at a reasonable time<sup>19</sup>. He may take with him such persons and equipment as he considers appropriate<sup>20</sup>. If the premises are unoccupied or the occupier is temporarily absent, the officer must take reasonable steps to ensure that when he leaves the premises they are as secure as they were before he entered<sup>21</sup>.

The powers exercisable when entry is made under these provisions are discussed below<sup>22</sup>.

A person commits an offence if, without reasonable excuse, he intentionally obstructs, or fails to co-operate with, an officer of a CPC enforcer who is exercising or seeking to exercise a power under the above provisions<sup>23</sup>.

The powers conferred by the above provisions are not exercisable in relation to premises occupied by the Crown<sup>24</sup>.

1 For the purposes of the Enterprise Act 2002 ss 227A-227F (see the text and notes 2-24; and PARAS 356-358), 'officer of a CPC enforcer' means (1) an officer of a local weights and measures authority in Great Britain; or (2) an authorised officer of a CPC enforcer which is not a local weights and measures authority in Great Britain; and 'authorised officer of a CPC enforcer' means an officer of a CPC enforcer who is authorised by that enforcer for the purposes of Pt 8 (ss 210-236): s 227A(9) (ss 227A, 227D, 227E added by SI 2006/3363). As to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1. As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20; and as to the meaning of 'Great Britain' see PARA 395 note 2.

2 As to the meaning of 'Community infringement' see PARA 341.

3 Ie under the Enterprise Act 2002 Pt 8 (ss 210-236): see PARAS 339 et seq, 356 et seq.

4 For the purposes of the Enterprise Act 2002 ss 227A-227F, 'premises' includes vehicles but does not include any premises which are used only as a dwelling: s 227A(9) (as added: see note 1).

5 Enterprise Act 2002 s 227A(1) (as added: see note 1).

6 For the purposes of the Enterprise Act 2002 ss 227A-227F, 'relevant enforcement measure' means (1) an enforcement order made under s 217 (see PARA 346) on the application of the CPC enforcer; (2) an interim enforcement order made under s 218 (see PARA 347) on the application of the CPC enforcer; (3) an undertaking under s 217(9) (see PARA 346) in connection with an application made by the CPC enforcer for an enforcement order under s 217; (4) an undertaking under s 218(10) (see PARA 347) in connection with an application made by the CPC enforcer for an interim enforcement order under s 218; or (5) an undertaking under s 219 (see PARA 349) to the CPC enforcer: s 227A(9) (as added: see note 1).

7 Enterprise Act 2002 s 227A(2) (as added: see note 1).

8 For these purposes, 'give', in relation to the giving of a notice to the occupier of premises, includes delivering or leaving it at the premises or sending it there by post: Enterprise Act 2002 s 227A(8) (as added: see note 1). See also note 9.

9 For the purposes of the Enterprise Act 2002 ss 227A-227F, 'occupier' means any person whom the officer concerned reasonably suspects to be the occupier: s 227A(9) (as added: see note 1).

10 Enterprise Act 2002 s 227A(3) (as added: see note 1).

11 As to the meaning of 'writing' see PARA 354 note 20.

12 For these purposes, 'working day' means a day which is not (1) Saturday or Sunday; or (2) Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in the part of the United Kingdom in which the premises are situated: Enterprise Act 2002 s 227A(8) (as added: see note 1). As to the meaning of 'United Kingdom' see PARA 401 note 1.

13 Ie the offence created by the Enterprise Act 2002 s 227E: see the text and note 23.

14 Enterprise Act 2002 s 227A(4) (as added: see note 1).

15 Enterprise Act 2002 s 227A(5) (as added: see note 1).

16 Enterprise Act 2002 s 227A(6) (as added: see note 1).

17 See note 1.

18 Enterprise Act 2002 s 227A(7) (as added: see note 1).

19 Enterprise Act 2002 s 227D(1) (as added: see note 1).

20 Enterprise Act 2002 s 227D(2) (as added: see note 1).

21 Enterprise Act 2002 s 227D(3) (as added: see note 1).

22 See PARA 356.

23 Enterprise Act 2002 s 227E(1) (as added: see note 1). A person guilty of such an offence is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale: s 227E(2) (as so added). As to the standard scale see PARA 16 note 18.

24 See PARA 339 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(iii) Information/356. Powers exercisable on the premises where entry is made without warrant.

### **356. Powers exercisable on the premises where entry is made without warrant.**

An officer of a CPC enforcer<sup>1</sup> may, in the exercise of his powers of entry without a warrant<sup>2</sup>:

- (1) observe the carrying on of a business on the premises<sup>3</sup>;
- (2) inspect goods<sup>4</sup> or documents<sup>5</sup> on the premises<sup>6</sup>;
- (3) require any person on the premises to produce goods or documents<sup>7</sup> within such period as the officer considers to be reasonable<sup>8</sup>;
- (4) seize goods or documents to carry out tests on them on the premises or seize, remove and retain them to carry out tests on them elsewhere<sup>9</sup>; or
- (5) seize, remove and retain goods or documents which he reasonably suspects may be required as evidence of a Community infringement<sup>10</sup> or a breach of a relevant enforcement measure<sup>11</sup>.

An officer of a CPC enforcer may take copies of, or extracts from, any documents to which he has access by virtue of heads (1) to (5) above<sup>12</sup>. Nothing in these provisions, however, authorises action to be taken in relation to anything which, in proceedings in the High Court, a person would be entitled to refuse to produce on the grounds of legal professional privilege<sup>13</sup>.

The powers conferred by the above provisions are not exercisable in relation to premises occupied by the Crown<sup>14</sup>.

1 As to the meaning of 'officer of a CPC enforcer' see PARA 355 note 1; as to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

2 I.e. his powers under the Enterprise Act 2002 s 227A: see PARA 356.

3 Enterprise Act 2002 s 227B(1)(a) (ss 227B, 227E added by SI 2006/3363). As to the meaning of 'premises' see PARA 355 note 4.

4 As to the meaning of 'goods' see PARA 339 note 5.

5 For these purposes, 'document' includes information recorded in any form: Enterprise Act 2002 s 227B(5) (as added: see note 3).

6 Enterprise Act 2002 s 227B(1)(b) (as added: see note 3).

7 The reference in the Enterprise Act 2002 s 227B(1)(c) (see head (3) in the text) to the production of documents is, in the case of a document which contains information recorded otherwise than in legible form, a reference to the production of a copy of the information in legible form: s 227B(6) (as added: see note 3).

8 Enterprise Act 2002 s 227B(1)(c) (as added: see note 3). The power in the Enterprise Act 2002 s 227B(1)(c) to require a person to produce goods or documents includes the power to require him (1) to state, to the best of his knowledge and belief, where the goods or documents are; (2) to give an explanation of the goods or documents; and (3) to secure that any goods or documents produced are authenticated or verified in such manner as the officer considers appropriate: s 227B(2) (as added: see note 3).

A person commits an offence if, without reasonable excuse, he intentionally obstructs, or fails to co-operate with, an officer of a CPC enforcer who is exercising or seeking to exercise a power under s 227B: s 227E(1) (as



added: see note 3). A person guilty of such an offence is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale: s 227E(2) (as so added). As to the standard scale see PARA 16 note 18.

9 Enterprise Act 2002 s 227B(1)(d) (as added: see note 3).

10 As to the meaning of 'Community infringement' see PARA 341.

11 Enterprise Act 2002 s 227B(1) (as added: see note 3). As to the meaning of 'relevant enforcement measure' see PARA 355 note 6.

12 Enterprise Act 2002 s 227B(3) (as added: see note 3).

13 Enterprise Act 2002 s 227B(4) (as added: see note 3). As to legal professional privilege see **LEGAL PROFESSIONS** vol 65 (2008) PARAS 507, 511. Section 227B(4) is modified in relation to Scotland: see s 227B(7) (as so added).

14 See PARA 339 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(iii) Information/357. Power to enter premises with warrant.

### **357. Power to enter premises with warrant.**

A justice of the peace<sup>1</sup> may issue a warrant authorising an officer of a CPC enforcer<sup>2</sup> to enter premises<sup>3</sup> for the statutory purposes<sup>4</sup> if the justice of the peace considers that there are reasonable grounds for believing that condition A is met and that either condition B, C or D is met<sup>5</sup>. Condition A is that there are, on the premises, goods<sup>6</sup> or documents to which an officer of a CPC enforcer would be entitled to have access<sup>7</sup> on entry without a warrant<sup>8</sup>. Condition B is that an officer of a CPC enforcer acting under the powers to enter premises without a warrant<sup>9</sup>, has been, or would be likely to be, refused admission to the premises or access to the goods or documents<sup>10</sup>. Condition C is that the goods or documents would be likely to be concealed or interfered with<sup>11</sup> if an appropriate notice were given<sup>12</sup> under the power to enter premise without a warrant<sup>13</sup>. Condition D is that there is likely to be nobody at the premises capable of granting admission<sup>14</sup>.

A warrant under these provisions authorises the officer of the CPC enforcer:

- (1) to enter the premises specified in the warrant, using reasonable force if necessary<sup>15</sup>;
- (2) to do anything on the premises that an officer of the CPC enforcer would be able to do if he had entered the premises under the power<sup>16</sup> to enter premises without a warrant<sup>17</sup>;
- (3) to search for goods or documents which he has required a person on the premises to produce where that person has failed to comply with such a requirement<sup>18</sup>;
- (4) to the extent that it is reasonably necessary to do so, to require any person who is responsible for discharging any of the functions of the business being carried on at the premises under inspection<sup>19</sup> to break open a container and, if that person does not comply with the requirement, or if such a person cannot be identified after all reasonably practicable steps have been taken to identify such a person, to do so himself<sup>20</sup>;
- (5) to take any other steps which he considers to be reasonably necessary to preserve, or prevent interference with, goods or documents to which he would be entitled to have access under the powers<sup>21</sup> to enter premises without a warrant<sup>22</sup>.

Such a warrant is issued on information on oath given by an officer of a CPC enforcer<sup>23</sup> and ceases to have effect at the end of the period of one month beginning with the day of issue<sup>24</sup>. It must, on request, be produced to the occupier<sup>25</sup> of the premises for inspection<sup>26</sup>.

An officer of a CPC enforcer who enters premises by virtue of the above provisions may take with him such persons and equipment as he considers appropriate<sup>27</sup>. If the premises are unoccupied or the occupier is temporarily absent, the officer must take reasonable steps to ensure that when he leaves the premises they are as secure as they were before he entered<sup>28</sup>.

A person commits an offence if, without reasonable excuse, he intentionally obstructs, or fails to co-operate with, an officer of a CPC enforcer who is exercising or seeking to exercise a power under the above provisions<sup>29</sup>.

The powers conferred by the above provisions are not exercisable in relation to premises occupied by the Crown<sup>30</sup>.

1       Ie or in Northern Ireland, a lay magistrate: Enterprise Act 2002 s 227C(11) (ss 227C, 227D, 227E added by SI 2006/3363). In its application to Scotland, the Enterprise Act 2002 s 227C has effect as if the references in s 227C(1) to a justice of the peace included references to a sheriff: s 227C(10)(a) (as so added).

2       As to the meaning of 'officer of a CPC enforcer' see PARA 355 note 1; as to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.

3       As to the meaning of 'premises' see PARA 355 note 4.

4       Ie for purposes falling within the Enterprise Act 2002 s 227A(1) or (2): see PARA 355.

5       Enterprise Act 2002 s 227C(1) (as added: see note 1).

6       As to the meaning of 'goods' see PARA 339 note 5.

7       Ie under the Enterprise Act 2002 ss 227A, 227B: see PARAS 355, 356.

8       Enterprise Act 2002 s 227C(2) (as added: see note 1).

9       See note 7.

10      Enterprise Act 2002 s 227C(3) (as added: see note 1).

11      For these purposes, any reference to goods or documents being interfered with includes a reference to them being destroyed: Enterprise Act 2002 s 227C(9) (as added: see note 1).

12      Ie an appropriate notice under the Enterprise Act 2002 s 227A: see PARA 355.

13      Enterprise Act 2002 s 227C(4) (as added: see note 1).

14      Enterprise Act 2002 s 227C(5) (as added: see note 1).

15      Enterprise Act 2002 s 227C(6)(a) (as added: see note 1).

16      Ie under the Enterprise Act 2002 s 227A: see PARA 355.

17      Enterprise Act 2002 s 227C(6)(b) (as added: see note 1).

18      Enterprise Act 2002 s 227C(6)(c) (as added: see note 1).

19      Ie any person to whom the Enterprise Act 2002 s 227C(7) applies.

20      Enterprise Act 2002 s 227C(6)(d), (7) (as added: see note 1).

21      See note 7.

22      Enterprise Act 2002 s 227C(6)(e) (as added: see note 1).

- 23 Enterprise Act 2002 s 227C(8)(a) (as added: see note 1). This provision is modified in relation to Scotland: see s 227C(10)(b) (as so added).
- 24 Enterprise Act 2002 s 227C(8)(b) (as added: see note 1).
- 25 As to the meaning of 'occupier' see PARA 355 note 9.
- 26 Enterprise Act 2002 s 227C(8)(c) (as added: see note 1).
- 27 Enterprise Act 2002 s 227D(2) (as added: see note 1).
- 28 Enterprise Act 2002 s 227D(3) (as added: see note 1).
- 29 Enterprise Act 2002 s 227E(1) (as added: see note 1). A person guilty of such an offence is liable, on summary conviction, to a fine not exceeding level 5 on the standard scale: s 227E(2) (as so added). As to the standard scale see PARA 16 note 18. Additional sanctions may be imposed under the Regulatory Enforcement and Sanctions Act 2008 Pt 3 (ss 36-71): see s 37(2), Sch 6. See further **ADMINISTRATIVE LAW**.
- 30 See PARA 339 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(iii) Information/358. Retention of documents and goods seized under powers of entry.

### **358. Retention of documents and goods seized under powers of entry.**

No documents seized under the powers of entry set out in the previous paragraphs<sup>1</sup> may be retained for a period of more than three months<sup>2</sup>.

No goods<sup>3</sup> seized under those powers of entry<sup>4</sup> may be retained for a period of more than three months unless they are reasonably required in connection with the exercise of any function of a CPC enforcer<sup>5</sup> under Part 8<sup>6</sup> of the Enterprise Act 2002<sup>7</sup>. Where goods are so required they may be retained for as long as they are so required<sup>8</sup>.

- 1     le seized under the Enterprise Act 2002 ss 227A-227D: see PARAS 355-357.
- 2     Enterprise Act 2002 s 227F(1) (s 227F added by SI 2006/3363).
- 3     As to the meaning of 'goods' see PARA 339 note 5.
- 4     See note 1.
- 5     As to the meaning of 'CPC enforcer' see PARA 342; and as to dual enforcers see PARA 342 note 1.
- 6     le under the Enterprise Act 2002 Pt 8 (ss 210-236): see PARAS 339 et seq, 359 et seq.
- 7     Enterprise Act 2002 s 227F(2) (as added: see note 2).
- 8     Enterprise Act 2002 s 227F(3) (as added: see note 2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(iv) Notices to be given to the Office of Fair Trading/359. Notice to the Office of Fair Trading of intended prosecution.

#### **(iv) Notices to be given to the Office of Fair Trading**

##### **359. Notice to the Office of Fair Trading of intended prosecution.**

If a local weights and measures authority in England and Wales<sup>1</sup> intends to start proceedings for an offence under an enactment or subordinate legislation<sup>2</sup> specified by the Secretary of State by order<sup>3</sup> for these purposes<sup>4</sup>, the following provisions apply<sup>5</sup>.

The authority must give the Office of Fair Trading (the 'OFT')<sup>6</sup>:

- (1) notice of its intention to start the proceedings;
- (2) a summary of the evidence it intends to lead in respect of the charges<sup>7</sup>.

The authority must not start the proceedings until whichever is the earlier of the following:

- (a) the end of the period of 14 days starting with the day on which the authority gives the notice;
- (b) the day on which it is notified by the OFT that the OFT has received the notice and summary given under heads (1) and (2) above<sup>8</sup>.

The authority must also notify the OFT of the outcome of the proceedings after they are finally determined<sup>9</sup>.

Such proceedings are not, however, invalid by reason only of the failure of the authority to comply with these provisions<sup>10</sup>.

1 As to local weights and measures authorities see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 20.

2 For these purposes, 'subordinate legislation' means Orders in Council, orders, rules, regulations, schemes, warrants, byelaws and other instruments made or to be made under any Act: Interpretation Act 1978 s 21(1) (definition applied by the Enterprise Act 2002 s 230(6)).

3 An order under the Enterprise Act 2003 s 230 (see the text and notes 1-2, 4-10) must be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament: s 230(7). As to the Secretary of State see PARA 5; and as to the exercise of this power see note 4.

4 As to the specified enactments and subordinate legislation see the Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments, Revocation and Transitional Provision) Order 2003, SI 2003/1376, Schedule; the Enterprise Act 2002 (Part 8 Notice to OFT of Intended Prosecution Specified Enactments) Order 2006, SI 2006/3371, art 3.

5 Enterprise Act 2002 s 230(1).

6 As to the OFT see PARAS 6-8.

7 Enterprise Act 2002 s 230(2).

8 Enterprise Act 2002 s 230(3).

9 Enterprise Act 2002 s 230(4).

10 Enterprise Act 2002 s 230(5).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/5. FAIR TRADING/(2) ENFORCEMENT OF CONSUMER LEGISLATION UNDER THE ENTERPRISE ACT 2002/(iv) Notices to be given to the Office of Fair Trading/360. Notice to the Office of Fair Trading of convictions and judgments.

### **360. Notice to the Office of Fair Trading of convictions and judgments.**

The following provisions apply if:

- (1) a person is convicted of an offence by or before a court in the United Kingdom<sup>1</sup>; or
- (2) a judgment is given<sup>2</sup> against a person by a court in civil proceedings in the United Kingdom<sup>3</sup>.

The court may make arrangements to bring the conviction or judgment to the attention of the Office of Fair Trading (the 'OFT')<sup>4</sup> if it appears to the court:

- (a) having regard to the functions of the OFT under Part 8 of the Enterprise Act 2002<sup>5</sup> or under the Estate Agents Act 1979<sup>6</sup> that it is expedient for the conviction or judgment to be brought to the attention of the OFT; and
- (b) that without such arrangements the conviction or judgment may not be brought to the attention of the OFT<sup>7</sup>.

For the purposes of heads (a) and (b) above it is immaterial that the proceedings have been finally disposed of by the court<sup>8</sup>.

- 1 As to the meaning of 'United Kingdom' see PARA 401 note 1.
- 2 For these purposes, 'judgment' includes an order or decree and references to the giving of the judgment must be construed accordingly: Enterprise Act 2002 s 231(4).
- 3 Enterprise Act 2002 s 231(1).
- 4 As to the OFT see PARAS 6-8.
- 5 I.e. the Enterprise Act 2002 Pt 8 (ss 210-236): see PARA 339 et seq.
- 6 As to the Estate Agents Act 1979 see **AGENCY** vol 1 (2008) PARA 239 et seq.
- 7 Enterprise Act 2002 s 231(2).
- 8 Enterprise Act 2002 s 231(3).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/361. Meaning and sources of 'monopoly'.

## **6. MONOPOLIES, COMPETITION AND THE COMMON LAW**

### **361. Meaning and sources of 'monopoly'.**

It is a monopoly and against the policy of the law for any person or group of persons to secure the sole exercise of any known trade<sup>1</sup> throughout the country<sup>2</sup>, unless permitted by Crown prerogative<sup>3</sup> or statute<sup>4</sup>.

A monopoly may come into being by Crown grant<sup>5</sup> or by statute<sup>6</sup>, by the exercise of intellectual property rights<sup>7</sup>, or from the activities of private persons or combinations of private persons<sup>8</sup>.

1 An exclusive right granted by a landowner to exercise rights over his land is not a monopoly: *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] 2 Ch 502, CA (revsd without affecting this point sub nom *De Beers Consolidated Mines Ltd v British South Africa Co* [1912] AC 52, HL); see **HIGHWAYS, STREETS AND BRIDGES** vol 21 (2004 Reissue) PARA 898 (ferry a monopoly); **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) PARA 1005 (holder of a franchise has a monopoly of the market). As to grants of rights over land see **EASEMENTS AND PROFITS A PRENDRE** vol 16(2) (Reissue) PARA 46 et seq. As to the meaning of 'trade' see PARA 369.

2 *Ipswich Tailors' Case* (1614) 11 Co Rep 53a; *Mitchel v Reynolds* (1711) 1 P Wms 181 at 187; *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422, CA (revsd on appeal [1914] AC 461, HL, on a point of pleading). Cf *East India Co v Sandys* (1685) Skin 132, 165, 197, 223 at 226, where it was said 'a monopoly is an immoral act, but only against the politic part of our law; which if it happens to be of advantage to the public as this trade is, then it ceases also to be against the politic part of our law and so not within the law of monopolies'. The old offences of badgering, forestalling, regrating and engrossing were abolished by 7 & 8 Vict c 24 (Forestalling, regrating, etc) (1844) s 1 (repealed): see *Mogul Steamship Co v McGregor, Gow & Co* (1889) 23 QBD 598 at 629, CA, per Fry LJ; *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422 at 444, CA, per Farwell LJ; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 793, PC, a case decided on an Australian Act, but containing a number of dicta of general application. Cf **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) PARA 1048 (disturbance of owner's exclusive right).

3 See PARA 362.

4 See PARA 364.

5 See PARA 362.

6 See PARA 364.

7 See eg *British Leyland Motor Corp Ltd v Armstrong Patents Co Ltd* [1986] AC 577, [1986] 1 All ER 850, HL, where a car manufacturer was able to exercise a monopoly in the supply of spare parts through use of copyright in design drawings; see further **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 25-27 (copyright in artistic works).

8 See PARA 367 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/362. Grant of monopoly by the Crown.

### 362. Grant of monopoly by the Crown.

The Crown cannot grant a monopoly without statutory authority<sup>1</sup>, except where the Crown has a prerogative of granting an exclusive right to print<sup>2</sup>.

1 The earliest authority for this proposition may be derived from Magna Carta 1215. The reissue Magna Carta 1297 (25 Edw 1) (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 372) employs the phrase 'Nullus liber homo . . . disseisetur de libero tenemento vel liberatibus vel liberis consuetudinibus suis' ('no free-man . . . shall be disseised of his freehold, or liberties, or free customs'), which was interpreted by Coke (2 Co Inst 47) as covering property in goods as well as other franchises and liberties; cf the argument in *Nightingale v Bridges* (1689) 1 Show 135 at 139; 5 Bac Abr, Monopoly (A); 3 Co Inst 182-183; Com Dig, Trade (D4); *Case of Monopolies* (1602) 11 Co Rep 84b, where a grant by letters patent of the sole right of making playing cards was held void as a monopoly against common law; *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422 at 445, CA, per Farwell LJ; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, PC. See also *BBC v Johns* [1965] Ch 32 at 79, [1964] 1 All ER 923 at 941, CA, per Diplock LJ.

In *East India Co v Sandys* (1685) Skin 132, 165, 197, 223, it was held that a grant to a company of the sole right of trading to the East Indies was good; but in *Nightingale v Bridges* (1689) 1 Show 135 it was held (although there was no considered judgment) that, although the Crown may give to a corporation the exclusive right to trade and hold territories within prescribed limits, yet a clause prohibiting others to trade within those limits under pain of imprisonment and forfeiture, and authorising the search and seizure of ships and goods, is void. The Crown's right to create such companies and to give them exclusive rights to trade was not disputed, but only the forfeiture clause. In 1694 (Commons Journals, 19 January 1694, pp 64-65) it was resolved 'that all subjects of England have equal right to trade to the East Indies unless prohibited by Act of Parliament': cf *Mitchel v Reynolds* (1711) 1 P Wms 181. In *East India Co v Sandys* (1685) Skin 132, 165, 197, 223 the validity of the grant was based on the Crown's prerogative to control trade with foreigners and to create companies. Cf *Michelborne v Michelborne* (1610) 2 Brownl 296. See **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 876 (freedom of trade); **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1133 (Crown's grant of a charter by special statute). As to licences to alien enemies to trade see **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 576 et seq.

2 As to the prerogative of the Crown to grant exclusive rights to print statutes, rules and orders, the Authorised Version of the Bible, the Book of Common Prayer, charts and ordnance maps, see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 5, and as to Crown copyright see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 144-149. As to the prerogative of the Crown generally see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 367 et seq; and cf *Mounson v Lyster* (1632) W Jo 231; *Earl of Yarmouth v Darrel* (1685) 3 Mod Rep 75; *Stationers' Co v Parker* (1685) Skin 233.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/363. The Statute of Monopolies.

### 363. The Statute of Monopolies.

By the Statute of Monopolies (1623), all monopolies, licences and letters patent for the sole buying, selling, making, working and using of anything within the realm<sup>1</sup> were declared void<sup>2</sup> with the exception of letters patent thereafter granted for 14 years or under to the first and true inventors of a manner of new manufacture which others at the time of the grant were not using<sup>3</sup>.

1 The statute does not extend to foreign trade: *East India Co v Sandys* (1685) Skin 132, 165, 197, 223.

2 Statute of Monopolies (1623) s 1 (partly repealed by the Statute Law (Repeals) Act 1969 s 1, Schedule Pt VII); Warrants and Patents Act (Ireland) 1459 (repealed by the Statute Law (Repeals) Act 1969 Schedule Pt VIII). See *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, PC; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 875 (grants of monopolies by the Crown); **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 339 (historical development of the patent system).

3 Statute of Monopolies (1623) s 6 (amended by the Statute Law Revision Act 1888). The term of a patent is now normally 20 years from the date of filing the application: see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 339. Monopolies previously granted by statute were exempted from prohibition (Statute of Monopolies (1623) s 7 (amended by the Statute Law Revision Act 1888)); and the statute did not affect any grants, charters, letters patent, or any customs of any city, borough or town corporate, or any corporation, company or fellowship of any art, trade or occupation (Statute of Monopolies (1623) s 9 (amended by the Statute Law Revision Act 1888)).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/364. Statutory monopolies.

### 364. Statutory monopolies.

There are certain monopolies in existence which have been authorised by statute, for example the provision of postal services<sup>1</sup> and the issue of bank notes in England and Wales by the Bank of England<sup>2</sup>. A number of statutory monopolies in former publicly owned industries have in recent years been abolished<sup>3</sup>.

1 See the Postal Services Act 2000 s 6; and **POST OFFICE** vol 36(2) (Reissue) PARA 78.

2 See the Bank Charter Act 1844 s 11; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 796.

3 See eg in relation to electricity, the Electricity Act 1989 ss 65, 66 (see **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1034).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/365. The modern legislation.

### **365. The modern legislation.**

Monopolies may arise where a market, either local or national, is controlled by a single person or a combination of persons. Since 1948 there has been a return to statutory supervision of such monopolies<sup>1</sup> and to restrictions on restrictive trade practices generally, and successive statutes have widened the scope of that supervision and those restrictions.

The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948<sup>2</sup> set up a commission, now known as the Competition Commission<sup>3</sup>, and empowered it to investigate and report on any industry referred to it in which the supply, processing or export of any goods was subject to monopoly conditions<sup>4</sup>, and certain government departments were given powers to make orders where such conditions were found to operate against the public interest<sup>5</sup>. From 1965 the Commission's jurisdiction extended to the supply of services in the United Kingdom<sup>6</sup>, and from 1973 statutory monopolies were included in its purview. The relevant provisions on the investigation of 'monopoly situations' are now contained in the Enterprise Act 2002<sup>7</sup>.

Since the entry into force of the Competition Act 1998 on 1 March 2000, agreements that prevent, restrict or distort competition<sup>8</sup> and the abuse of a dominant position<sup>9</sup> are prohibited.

1 As to the repeal of earlier statutes dealing with monopolies see PARA 361 note 2. For the changing attitude of the law during the last century to restraint of trade in general see PARAS 386-388. For the present effect of the common law on monopolies see PARA 366.

2 The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 was repealed and replaced by the Fair Trading Act 1973 which in turn was repealed by the Competition Act 1998 (see PARA 115).

3 As to the Competition Commission see PARAS 12-13.

4 See the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 ss 1-9, 14, 15, 20 (repealed). No reference could be made of statutory monopolies other than those arising from patents or trade marks: s 2(1) (repealed).

5 See the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 ss 10-13 (repealed).

6 See the Monopolies and Mergers Act 1965 (repealed).

7 See PARA 276 et seq.

8 See PARAS 116-124.

9 See PARAS 125-128.



Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/366. Subsisting effect of common law on monopolies.

### **366. Subsisting effect of common law on monopolies.**

Despite the wide scope of the Enterprise Act 2002 and the Competition Act 1998, the common law has not been displaced<sup>1</sup>, and it may still be necessary to consider whether an agreement is void as a monopoly or otherwise as being in restraint of trade at common law<sup>2</sup>.

1 Thus the High Court could, it seems, still hold an agreement void as creating an unlawful monopoly at common law.

2 See PARA 367. As to restraint of trade in general see PARA 377 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/367. Attempts to control markets.

### **367. Attempts to control markets.**

An agreement may be illegal at common law if, by causing the control of a trade or industry to pass into the hands of an individual or of a group of individuals, it creates a monopoly calculated to enhance prices to an unreasonable extent<sup>1</sup>.

The agreement must be considered in the light of all surrounding circumstances<sup>2</sup>, including agreements made between the parties and third persons<sup>3</sup>, possible competition from abroad and the effect on it of tariffs<sup>4</sup>, and the benefits accruing to the public from regulated supply, economy of resources and elimination of cut-throat competition<sup>5</sup>.

Such an agreement is merely unenforceable; it is not illegal in any criminal sense, nor does it give any cause of action to a third person injured by its operation<sup>6</sup>. Unless the agreement is illegal on the face of it, the issue of illegality must be raised in the particulars of claim<sup>7</sup>.

However, it is no monopoly if the control, being lawfully and fairly obtained, is limited to particular persons or places<sup>8</sup> or to a particular kind or make of article for which a substitute is obtainable<sup>9</sup>, and an agreement among traders to prevent competition among themselves and even to keep up prices is not necessarily invalid at common law, if it is carried out by provisions reasonably necessary for the purpose and not detrimental to the public<sup>10</sup>. However, such agreements would normally infringe the Competition Act 1998<sup>11</sup>, and would also be likely to infringe European competition law in so far as they affect trade between member states<sup>12</sup>.

1 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912), as reported in 107 LT 439, CA (revsd [1914] AC 461, HL, on the grounds that the contract was not illegal on the face of it, and that the issue of illegality had not been raised on the pleadings). The judgments of the majority in the Court of Appeal laying down the principle set out in the text were criticised as to their application of the principle to the facts of the case, but the principle itself was not doubted: see per Lord Haldane LC at 469, 471-472. See also *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 796, PC; *Palmolive Co (of England) Ltd v Freedman* [1928] Ch 264, CA.

2 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461 at 469, HL, per Lord Haldane LC.

3 Such other agreements are relevant for the purpose of ascertaining the object of the restrictions imposed in the agreement under consideration and whether such restrictions are reasonably necessary for the protection of the covenantees' interest: see *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912), as reported in 107 LT 439 at 440, CA, per Vaughan Williams LJ (on appeal [1914] AC 461 at 470, HL, per Lord Haldane LC). The dictum that 'no evidence is given in these public policy cases' (*Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 at 45, HL, per Lord Bramwell) does not mean that such evidence is not to be admitted (*North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* at 440). See also *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 306, CA, where Lindley MR said that the contract must be construed with reference to the business of the claimant which it was the object of the parties to protect.

4 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461 at 469, HL, per Lord Haldane LC; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 796, PC.

5 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461 at 469, 471, HL, per Lord Haldane LC, and at 481 per Lord Sumner.

6 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912), as reported in 107 LT 439 at 444, CA, per Farwell LJ; *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25, HL; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 797, PC. See also the cases on restraint of trade cited in PARA 433 notes 2-3.

7 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461, HL; and, as to particulars of claim, see **CIVIL PROCEDURE** vol 11 (2009) PARA 584 et seq. Although illegality should be pleaded, the court, if the contract concerned is illegal on the face of it, may refuse to enforce it. It appears that if the agreement is not illegal on the face of it the burden of proving the facts rendering it illegal is upon the party alleging illegality: see *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* at 480 per Lord Sumner, and *Palmolive Co (of England) Ltd v Freedman* [1928] Ch 264 at 271, CA, per Lord Hanworth MR; but cf *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* at 470 per Lord Haldane LC. See also *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 797, PC.

8 *Freemantle v Silk Throwsters' Co* (1668) 1 Lev 229, where a byelaw of a company binding members not to have over a certain number of spindles per week was held not a monopoly, but a restraint of a monopoly and therefore good; *Mitchel v Reynolds* (1711) 1 P Wms 181 at 187. An agreement by one trader to take a particular class of goods exclusively from another is not in restraint of trade: *Servais Bouchard v Prince's-Hall Restaurant Ltd* (1904) 20 TLR 574, CA; *British Oxygen Co v Liquid Air Ltd* [1925] Ch 383.

9 *Palmolive Co (of England) Ltd v Freedman* [1928] Ch 264, CA, where the agreement by the defendant, a retailer, was not to sell a particular brand of toilet soap manufactured by the claimants 'however acquired' below an agreed price.

10 *Kirkman v Shawcross* (1794) 6 Term Rep 14 (where an agreement by a number of dyers not to receive goods to be dyed except on the terms that they should have a general lien was held legal and to have created a legal agreement between a party and a person sending goods with knowledge of it); *Hearn v Griffin* (1815) 2 Chit 407 (where an agreement between postmasters not to compete was held legal); *Wickens v Evans* (1829) 3 Y & J 318 (where an agreement between traders to parcel out England, not to compete or assist rival traders, and not to purchase certain goods in a certain place at prices higher than certain agreed prices was held legal); *Shrewsbury and Birmingham Rly Co v London and North Western Rly Co* (1851) 17 QB 652 (where an agreement excluding competition was held legal); *Jones v North* (1875) LR 19 Eq 426 (where an agreement between traders to sell goods at a certain price, and that some of them should not tender for a contract at a lower price than one or more of the others, was held legal); *Collins v Locke* (1879) 4 App Cas 674 at 685, PC (where a number of stevedores parcelled out the shipping of a port among themselves by allotting to each the ships consigned to certain named traders, and it was held a reasonable provision that if any of the traders refused to allow the work to be done by the party to whom it was allotted the party securing the work should make good the loss to the party losing it; but a provision which in effect provided that, if a ship was loaded by a person other than the consignee and such person did not choose the stevedore entitled under the agreement, no other party to the agreement should do the work was held to be unreasonable); *Cade v Daly* [1910] 1 IR 306 (where an agreement not to sell below certain prices was held enforceable if reasonably limited (distinguishing *Urmston v Whitelegg Bros* (1890) 63 LT 455, where an agreement not to sell at less than a specified price for ten years, under a penalty, was held unenforceable; and *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25, HL)). See also *Keppell v Bailey* (1834) 2 My & K 517 (where it was questioned whether an agreement by lessees of ironworks with a railway company to procure all their limestone from a certain quarry and convey all of it along the railway at an agreed charge was an unreasonable restraint, the case being decided on a different point); *Toby v Major* (1899) 107 LT Jo 489 per Darling J, who queried whether an agreement between German bakers to remove the competition of an English baker by buying him out and restraining him from trading within three miles was against public policy; *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422, CA (revsd [1914] AC 461, HL); *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, PC;

*Palmolive Co (of England) Ltd v Freedman* [1928] Ch 264, CA (see note 9). As to bidding agreements at auctions see **AUCTION** vol 2(3) (Reissue) PARA 246.

11 See PARAS 116-124.

12 Ie the EC Treaty art 81: see PARAS 4, 61 et seq. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/6. MONOPOLIES, COMPETITION AND THE COMMON LAW/368. Restrictions as to user.

### 368. Restrictions as to user.

Even though the object or effect may be to secure a monopoly, a trader selling goods, other than articles protected by a patent<sup>1</sup>, or letting them for hire may, at common law, by the contract of sale or lease prohibit their use with goods supplied by rival traders<sup>2</sup> and attach other conditions calculated to protect himself from such rivals<sup>3</sup>. However, such a prohibition may infringe the Competition Act 1998<sup>4</sup> and may lead to infringement of European competition law<sup>5</sup>.

1 As to this exception and its limitations see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 403 et seq (restrictions on contracts).

2 *Mallan v May* (1843) 11 M & W 653 at 668; *Leather Cloth Co v Lonsont* (1869) LR 9 Eq 345; *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330, PC.

3 *Jones v Lees* (1856) 1 H & N 189, where the covenant was by the licensee of a patented improvement for a term not to make or vend the machine without the improvement during the term; *British United Shoe Machinery Co v Somervell Bros* (1906) 95 LT 711, where there was a lease of machines with a condition that they should be used to their full capacity during the term, so far as the number of goods made in the factory would permit. As to the position in relation to goods which were exempted goods under the Resale Prices Act 1976 (repealed) see *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335, CA, where there was a sale of phonographs to wholesale dealers on terms that they should not sell to dealers who had not signed a retailer's agreement, or to dealers placed on a 'suspended list', both classes of dealers being bound not to sell at less than current list prices; see also *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* at 356 per Lord Alverstone CJ, who said 'I cannot see any objection to a trader in such a trade saying that he will not, if he can help it, allow his machines to be at the disposal of his trade rivals'. If a person has agreed not to sell to a person on a 'suspended list' he does not commit a breach of that agreement if he sells to such a person in ignorance induced by fraud; *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* at 368 per Kennedy LJ. See also *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* (1913) 29 TLR 270 (revsd on appeal [1915] AC 847, HL, where the point referred to here was not discussed).

4 See PARA 116 et seq.

5 Ie the EC Treaty arts 81, 82: see PARAS 4, 24 et seq. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(1) TRADE AND BUSINESS/369. Meaning of 'trade'.

## 7. TRADE AND FREEDOM TO TRADE

## (1) TRADE AND BUSINESS

### 369. Meaning of 'trade'.

'Trade'<sup>1</sup> in its primary meaning is the exchange of goods for goods or goods for money, and in a secondary meaning it is any business carried on<sup>2</sup> with a view to profit, whether manual or mercantile, as distinguished from the liberal arts or learned professions and from agriculture<sup>3</sup>. However, the word is of very general application<sup>4</sup>, and must always be considered in the context in which it is used<sup>5</sup>. As used in various revenue Acts, 'trade' is not limited to buying and selling<sup>6</sup>, but may include manufacture<sup>7</sup>. In the expression 'restraint of trade' the word is used in its loosest sense to cover every kind of trade, business, profession or occupation<sup>8</sup>.

1 As to the exercise of trade see PARA 372.

2 As to where a trade is carried on see *Crookston Bros v Inland Revenue* 1911 SC 217; and **COMPANIES; CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1125.

3 The statement in the text summarises the dictionary definitions, but as to the immateriality of 'a view to profit' in the legal conception of the term see PARA 371 note 1. See also *Chartered Mercantile Bank of India, London and China v Wilson* (1877) 3 ExD 108 at 120 per Pollock B; *Grainger & Son v Gough* (*Surveyor of Taxes*) [1896] AC 325 at 336, HL, per Lord Herschell (a wine merchant exercises his trade 'by making or buying wine and selling it again with a view to profit'), and at 345 per Lord Davey; *Taxation Comrs v Kirk* [1900] AC 588 at 592, PC ('the word 'trade' no doubt primarily means traffic by way of sale or exchange or commercial dealing, but may have a larger meaning so as to include manufactures'); *Palmer v Snow* [1900] 1 Qb 725 at 727, DC ('trade' is buying and selling); *Robinson v Groscourt* (1695) 5 Mod Rep 104 at 108 (music and dancing are not trades, but professions); cf *Wannel v City Chamberlain of London* (1725) 1 Stra 675; *Speak v Powell* (1873) LR 9 Exch 25 at 27 (the occupation of a circus proprietor is not a trade; nor is that of an actor or professional gymnast or theatre proprietor); *Harris v Amery* (1865) LR 1 CP 148 at 154 (banking is not a trade); but cf *Hall v Franklin* (1838) 3 M & W 259 (banking is included in the words 'dealing for profit'); *R v Industrial Disputes Tribunal, ex p East Anglian Trustee Savings Bank* [1954] 2 All ER 730 at 731-732, [1954] 1 WLR 1093 at 1096, DC, per Lord Goddard CJ (ordinarily speaking, banking is a trade); *Frampton v Gillison* [1927] 1 Ch 196, CA (carrying on a sub-post office does not infringe a restrictive covenant against 'trading'); *Pauley v Kenaldo Ltd* [1953] 1 All ER 226, [1953] 1 WLR 187 (cloakroom attendant; arrangement 'by way of trade' for the purposes of legislation replaced by the statutory provisions as to wages councils (now abolished); and cf the following decisions under other similar legislation: *Skinner v Jack Breach Ltd* [1927] 2 KB 220, DC; *R v Minister of Labour, ex p National Trade Defence Association* [1932] 1 KB 1, CA). See also *R v Industrial Disputes Tribunal, ex p Courage & Co Ltd* [1956] 3 All ER 411, [1956] 1 WLR 1062, DC ('section of trade or industry' not confined to a particular undertaking). Statutes enacting that everyone might sell commodities in any city by gross or retail were held not to apply to artificers or manufacturers: *City of London Case* (1610) 8 Co Rep 121b at 128a. The making and using of a decoy pond for ducks which entails labour and expense was treated as trade (*Keeble v Hickeringill* (1706) 11 East 574n), but not the mere chance of capturing or of enjoying the presence of animals *ferae naturae* which come to a place of their own accord and are not fit for human food, such as rooks (*Hannam v Mockett* (1824) 2 B & C 934); but see *Read v Edwards* (1864) 17 CBNS 245 at 258; *Allen v Flood* [1898] AC 1 at 36, HL, per Cave J; and **ANIMALS** vol 2 (2008) PARA 710 et seq. For an analysis of different kinds of trade see the arguments of Sawyer A-G in *East India Co v Sandys* (1685) Skin 197 at 198.

4 See eg *National Association of Local Government Officers v Bolton Corp'n* [1943] AC 166 at 184-185, [1942] 2 All ER 425 at 432-433, HL, per Lord Wright ('trade or industry').

5 As to the meaning of 'trade or business' in relation to the Agricultural Holdings Act 1986 s 1 see *Rutherford v Maurer* [1962] 1 QB 16, [1961] 2 All ER 775, CA (decided on the previous provision in the Agricultural Holdings Act 1948 s 1 (repealed)); in relation to bankruptcy legislation see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 51, 587; in relation to companies legislation see **COMPANIES**; in relation to income tax see **INCOME TAXATION** vol 23(1) (Reissue) PARA 105; and in relation to restrictive covenants in conveyances or leases see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 501. As to 'use for trade' in relation to weights and measures see the Weights and Measures Act 1985 s 7; and **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 66. As to trade customs and usages see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARAS 605, 687 et seq; **INSURANCE** vol 25 (2003 Reissue) PARAS 232 et seq, 407. For the distinction between trade purposes and domestic purposes in relation to water supply see **WATER AND WATERWAYS** vol 100 (2009) PARA 334, and for the distinction between commercial waste, industrial waste and household waste, which has replaced the former distinction between trade refuse and domestic refuse see **ENVIRONMENTAL QUALITY AND PUBLIC HEALTH** vol 46 (2010) PARA 624. Under the Sunday Observance Act 1677 (repealed), the following were held not to be tradesmen: a farmer (*R v Cleworth* (1864) 4 B & S 927; but farming is a business:

see *Harris v Amery* (1865) LR 1 CP 148), a barber (*Palmer v Snow* [1900] 1 QB 725, DC; but a barber's business was expressly included in the definition of 'retail trade or business' under the Shops Act 1950 (repealed) s 74(1)), and an estate agent (*Gregory v Fearn* [1953] 2 All ER 559, [1953] 1 WLR 974, CA); cf *Hawkey v Stirling* [1918] 1 KB 63, DC, where an amusements caterer who sold various articles such as rings and darts to enable purchasers to enter into competitions on his premises with these articles was held to be trafficking in goods and a tradesman.

6 See *Chartered Mercantile Bank of India, London and China v Wilson* (1877) 3 ExD 108, where occupation for the purposes of a telegraph company was held to be occupation for the purpose of trade only for the purposes of exemption from the former inhabited house duty; see also at 113 per Kelly CB ('It was not the intention of the legislature to limit the meaning of the word 'trade' to buying and selling; though that is the literal meaning of the word'), and at 115 ('We may reasonably say that it ('trade') was intended to embrace a great variety of different operations though all of a commercial character; something therefore like a warehouse, like a shop, like a counting house'); *Barry (Inspector of Taxes) v Cordy* [1946] 2 All ER 396, CA; *Edinburgh Life Assurance Co v Inland Revenue Solicitor* (1875) 2 R 394, Ct of Sess (distinguished in *Chartered Mercantile Bank of India, London and China v Wilson* (1877) 3 ExD 108 at 115 (a life assurance company is not a trader)). Cf *Citizens Insurance Co of Canada v Parsons*, *Queen Insurance Co v Parsons* (1881) 7 App Cas 96 at 111-112, PC; *Re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (1888) 22 QBD 279, DC, where a limited company publishing and selling law reports, but precluded from paying a dividend, apparently carried on a trade within the Customs and Inland Revenue Act 1885 s 11 (repealed); but the word 'business' was there also used. Cf **INCOME TAXATION** vol 23(1) (Reissue) PARA 105.

7 See *Taxation Comrs v Kirk* [1900] AC 588 at 592, PC. Trade may also include an adventure or concern in the nature of trade: see **INCOME TAXATION** vol 23(1) (Reissue) PARA 105.

8 For a list of the trades to which the doctrine of restraint of trade has been applied see PARA 432. As to contracts in restraint of trade generally see PARA 377 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(1) TRADE AND BUSINESS/370. Meaning of 'business'.

### 370. Meaning of 'business'.

'Business'<sup>1</sup> is a wider term than 'trade', and not synonymous with it, and means almost anything which is an occupation as distinguished from a pleasure<sup>2</sup>. However, the term must be construed according to its context<sup>3</sup>.

1 As to the exercise of business see PARA 372.

2 *Doe d Wetherell v Bird* (1834) 2 Ad & El 161 (the use of premises as a private lunatic asylum is not a trade; cf at 166 per Lord Denman CJ ('Every trade is a business, but every business is not a trade; to answer that description it must be conducted by buying and selling')); *Harris v Amery* (1865) LR 1 CP 148 at 154 per Willes J; *Rolls v Miller* (1884) 27 ChD 71, CA (the carrying on of a charitable home for working girls, boarded without payment, is not a trade, but it is the business of a lodging-house keeper; and cf at 88 per Lindley LJ ('The word ('business') means almost anything which is an occupation as distinguished from a pleasure, anything which is an occupation or duty which requires attention is a business')); *Town Investments Ltd v Department of the Environment* [1978] AC 359, [1977] 1 All ER 813, HL. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 587; **COMPANIES** vol 14 (2009) PARA 1; **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 501; and cf **PARTNERSHIP** vol 79 (2008) PARA 6. The business of a solicitor is a 'profession' and not a 'trade or business' within the meaning of a statute which draws a distinction between those terms: see *Stuchbery v General Accident, Fire and Life Assurance Corp'n Ltd* [1949] 2 KB 256, [1949] 1 All ER 1026, CA.

3 The pursuit by a person gratuitously of a spare time activity in his own home does not fall within the Landlord and Tenant Act 1954 s 23(2), which defines 'business' as including a trade, profession or employment (*Abernethie v AM and J Kleiman Ltd* [1970] 1 QB 10, [1969] 2 All ER 790, CA); nor does taking in lodgers and making virtually no profit out of it (*Lewis v Weldcrest Ltd* [1978] 3 All ER 1226, [1978] 1 WLR 1107, CA), nor does an activity conducted merely for pleasure and social enjoyment constitute a business for the purpose of what is now the Value Added Tax Act 1994 s 4(1) (*Customs and Excise Comrs v Lord Fisher* [1981] 2 All ER 147).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(1) TRADE AND BUSINESS/371. Disregard of profit.

### 371. Disregard of profit.

Profit, or the intention to make profit, is not an essential part of the legal definition of a trade or business unless the particular context so requires; and payment or profit does not of itself constitute a trade or business<sup>1</sup>.

1 *Bramwell v Lacy* (1879) 10 ChD 691; *Rolls v Miller* (1884) 27 ChD 71, CA; *Paddington Burial Board v IRC* (1884) 13 QBD 9, DC. See also *Rael-Brook Ltd v Minister of Housing and Local Government* [1967] 2 QB 65, [1967] 1 All ER 262, DC. For the case of a trade see *Re Duty on Estate of Incorporated Council of Law Reporting for England and Wales* (1888) 22 QBD 279 at 293, DC, per Lord Coleridge CJ ('the definition of the mere word 'trade' does not necessarily mean something by which a profit is made'); but the particular context may import profit: see the cases cited in PARA 369 note 3; see also **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 501. Sometimes the words 'gain' or 'profit' are expressly used, as in 57 Geo 3 c 99 (Residence on benefices, etc) (England) (1817) s 3 (repealed). Under the Customs and Inland Revenue Act 1878 s 13 (repealed), occupation for the purposes of a reading-room and library (*London Library v Carter (Surveyor of Taxes)* (1890) 6 TLR 161), or medical institute (*British Institute of Preventive Medicine v Styles* (1895) 11 TLR 432), with no payment of dividends, was held not to be an occupation 'for the purposes of any trade or business . . . by which the occupier seeks a profit'. Under the Companies Act 1862 s 4 (repealed), farming and grazing was held to be a 'business that has for its object the acquisition of gain': *Harris v Amery* (1865) LR 1 CP 148. See also the following further decisions under repealed enactments: *Shoyle v Taylor* (1607) Cro Jac 178; *City of London Case* (1610) 8 Co Rep 121b at 128a; *Raynard v Chase* (1756) 1 Burr 2 (sleeping partner: see PARA 372 note 1); *Beach v Turner* (1769) 4 Burr 2450.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(1) TRADE AND BUSINESS/372. Exercise of trade or business.

### 372. Exercise of trade or business.

The words 'to exercise a trade or business' imply that the trade or business must be habitually or systematically exercised; they do not apply to isolated transactions<sup>1</sup>. Moreover, it is not trading for a person to make articles for his own use or the use of his family or of a family which he serves<sup>2</sup>, or to work for his own purposes only<sup>3</sup>.

1 *Grainger & Son v Gough (Surveyor of Taxes)* [1896] AC 325 at 343, HL, per Lord Morris (dissenting on the main question in the case from the majority of the court); *Newman v Oughton* [1911] 1 KB 792, DC; *Spiers and Pond Ltd v Green* [1912] 3 KB 576, DC; see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 125; **CONSUMER CREDIT** vol 9(1) (Reissue) PARA 56. However, if a person carrying on a particular business does a single isolated preliminary first act in that business, he is carrying it on: see *A-G v Plymouth Corp'n* (1909) 100 LT 742 at 744, CA, per Buckley LJ. As to a sleeping partner see *Hobbs v Young* (1691) 2 Salk 610, where a person who directed the trade was held to be exercising it, but not a journeyman; *Raynard v Chase* (1756) 1 Burr 2, where under a penal Act in restraint of trade, which was strictly construed, a partner who shared profit and loss but took no part in the management was held not to be exercising the trade. As to how far a sleeping partner is bound see **PARTNERSHIP** vol 79 (2008) PARA 45.

2 *Shoyle v Taylor* (1607) Cro Jac 178; *City of London Case* (1610) 8 Co Rep 121b at 128a, 129a ('It is not properly said that one uses a manual occupation when he makes no more than for himself, as he who brews or bakes for his own use'); *Ipswich Taylors' Case* (1614) 11 Co Rep 53a at 54a, where a domestic servant making garments for his master was not exercising a trade within the meaning of a penal enactment in restraint of trade or the byelaw of a corporation of tailors; *Norris v Staps* (1616) Hob 120 at 211 (it is not exercising a trade to do it privately, as a tailor in a house, or the like); *Hobbs v Young* (1691) 2 Salk 610.

3 *Fazakerley v Wiltshire* (1721) 1 Stra 462, where a byelaw regulating porters did not apply to a person carrying his own goods; *A-G v Plymouth Corpn* (1909) 100 LT 742, CA (it is not carrying on the business of a wharfinger to use one's own wharf for loading and unloading materials for one's own works; nor is it 'permitting' such a business to be carried on to lease neighbouring land with leave to the lessee to use the wharf for loading or unloading materials for his own works).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(2) SALE OF GOODWILL/373. Implied sale; form of transfer.

## (2) SALE OF GOODWILL

### 373. Implied sale; form of transfer.

The sale of a business implies the sale of its goodwill<sup>1</sup>, even though goodwill is not expressly mentioned<sup>2</sup>, but an agreement by a partner to retire from a firm is not necessarily equivalent to an agreement to sell the goodwill<sup>3</sup>.

A transfer of goodwill can be effected without writing, except in so far as writing may be required by the Law of Property (Miscellaneous Provisions) Act 1989<sup>4</sup> in a transfer involving also the sale of land<sup>5</sup>.

1 As to the nature of goodwill generally see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1206 et seq. As to goodwill to which a mortgagee is entitled see **MORTGAGE** vol 77 (2010) PARA 198. As to compensation for loss of goodwill on compulsory acquisition see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARAS 816, 822; see also *LCC v Tobin* [1959] 1 All ER 649, [1959] 1 WLR 354, CA. As to goodwill in companies' accounts see **COMPANIES** vol 15 (2009) PARA 730. Goodwill is part of fixed capital (see **COMPANIES** vol 15 (2009) PARA 720), and a charge on a company's property or assets includes goodwill (see **COMPANIES** vol 15 (2009) PARA 1269).

2 *Shipwright v Clements* (1871) 19 WR 599. It passes with the stock-in-trade or the premises, according to the circumstances of each case: *England v Downs* (1842) 6 Beav 269. As to goodwill in partnership cases generally see **PARTNERSHIP** vol 79 (2008) PARAS 23, 172, 203, 213-217. As to whether a transfer of a solicitor's business and goodwill carries the right to clients' deeds and papers see **LEGAL PROFESSIONS** vol 66 (2009) PARA 785.

3 *Gray v Smith* (1889) 43 ChD 208 at 221, CA, per Cotton LJ (distinguishing *Levy v Walker* (1879) 10 ChD 436, CA). However, when a partner assigns his share in a business it is clearly intended that the goodwill is to pass: *Churton v Douglas* (1859) John 174 at 186. As to prohibitions of the sale of goodwill of medical practices in the national health service see **HEALTH SERVICES** vol 54 (2008) PARA 273 et seq.

4 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 79 et seq; **SALE OF LAND** vol 42 (Reissue) PARA 32 et seq.

5 *IRC v G Angus & Co, IRC v Lewis* (1889) 23 QBD 579 at 593, CA, per Lord Esher MR; the proposition was admitted in argument (at 587). An agreement by a partner to assign a share of partnership assets which include an interest in land is within what is now the Law of Property (Miscellaneous Provisions) Act 1989 s 2: *Gray v Smith* (1889) 43 ChD 208, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(2) SALE OF GOODWILL/374. Rights of transferee.

### 374. Rights of transferee.

A transfer of goodwill confers on the transferee the exclusive right to carry on the business transferred, the exclusive right to represent himself as carrying on such business<sup>1</sup> and, as against the transferor, the exclusive right to use the name under which the business has been carried on<sup>2</sup>, but the name must not be so used as to expose the transferor to a risk of personal liability owing to his being held out as the owner of, or a partner in, the business<sup>3</sup>.

1 *Walker v Mottram* (1881) 19 ChD 355 at 363, CA. The transferee may also restrain any other person from untruly representing that he carries on, or is the successor to, such business: *Rickerby v Reay* (1903) 20 RPC 380.

2 *Banks v Gibson* (1865) 34 Beav 566 at 569 per Romilly MR; *Levy v Walker* (1879) 10 ChD 436 at 448, CA; *Thynne v Shove* (1890) 45 ChD 577; *Re David and Matthews* [1899] 1 Ch 378 at 384; *Burchell v Wilde* [1900] 1 Ch 551 at 558, CA, per Byrne J; *Mrs Pomeroy Ltd v Scalé* (1906) 22 TLR 795 (subsequent proceedings 23 TLR 170); *RJ Reuter & Co Ltd v Mulhens* (1953) 70 RPC 102 at 121 (affd [1954] Ch 50, [1953] 2 All ER 1160, CA) (involuntary transfer of enemy-owned goodwill). An agreement to retire from a firm, with no express assignment of the goodwill, does not, however, give the remaining partner the right to use the name of the retiring partner (*Gray v Smith* (1889) 43 ChD 208, CA; see also *Hall v Barrows* (1863) 4 De GJ & Sm 150; *Leather Cloth Co v American Leather Cloth Co* (1865) 11 HL Cas 523; *Scott v Rowland* (1872) 26 LT 391), but it is otherwise where the goodwill is divided between partners (*Burchell v Wilde* [1900] 1 Ch 551, CA). See **PARTNERSHIP** vol 79 (2008) PARAS 172, 213 et seq. As to trade names and trade marks generally see **TRADE MARKS AND TRADE NAMES**.

3 *Chappell v Griffith* (1885) 53 LT 459; *Chatteris v Isaacson* (1887) 57 LT 177; *Thynne v Shove* (1890) 45 ChD 577; *Jennings v Jennings* [1898] 1 Ch 378 at 388; *Burchell v Wilde* [1900] 1 Ch 551, CA; *Townsend v Jarman* [1900] 2 Ch 698 at 705; *RJ Reuter & Co Ltd v Mulhens* (1953) 70 RPC 102 at 121 per Danckwerts J (affd [1954] Ch 50, [1953] 2 All ER 1160, CA) (involuntary transfer of enemy-owned goodwill). As to the right to use a partnership name see **PARTNERSHIP** vol 79 (2008) PARAS 172, 215 et seq. Whether the name is a real or fancy name is material in deciding whether such a risk is caused: *Chatteris v Isaacson* (1887) 57 LT 177; *Gray v Smith* (1889) 43 ChD 208, CA; *Thynne v Shove* (1890) 45 ChD 577 at 582. See also *Churton v Douglas* (1859) John 174 at 190. Where the vendor has carried on the business in a name not his own and sold the goodwill with the exclusive right to use that name, he may not afterwards trade under that name in competition with the purchaser; and there may be cases in which the name is so identified with the business that the vendor may not use it even in the absence of express words granting the rights in it to the purchaser: *Mrs Pomeroy Ltd v Scalé* (1906) 23 TLR 170.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(2) SALE OF GOODWILL/375. Position of vendor.

### 375. Position of vendor.

In the absence of an express restrictive covenant, no covenant by the vendor of the goodwill of a business not to set up a competing business will be implied, and he may set up a competing business<sup>1</sup>, unless he is estopped by conduct amounting to fraud which has encouraged others to involve themselves in the business sold, or to pay him money, in the confidence that he will not trade again either at all or within a limited area<sup>2</sup>. He may advertise himself as having been a partner in, or the founder of or a manager or employee in, the old business<sup>3</sup>; but he may not represent himself to be a successor to, or as carrying on a continuation of, the old business<sup>4</sup>, or use the trade marks of the old business<sup>5</sup>.

Similarly, a person who has sold the goodwill<sup>6</sup> may not solicit privately any person who was a customer of the business prior to the sale<sup>7</sup>, although he may advertise publicly and deal with such persons as come to him unsolicited<sup>8</sup>, or, apparently, with such persons as, having been solicited, at first resist such solicitation but subsequently come to him without further solicitation because of dissatisfaction with the old firm<sup>9</sup>.

1 *Trego v Hunt* [1896] AC 7, HL. See also *Shackle v Baker* (1808) 14 Ves 468 at 469; *Cruttwell v Lye* (1810) 17 Ves 335 at 346; *Bozon v Farlow* (1816) 1 Mer 459 at 474; *Harrison v Gardner* (1817) 2 Madd 198 at 219;



*Kennedy v Lee* (1817) 3 Mer 441 at 455 (see Collyer's Law of Partnership (2nd Edn) 102-103); *Cook v Collingridge* (1825) 27 Beav 456; *Re Thomas, ex p Thomas* (1841) 2 Mont D & De G 294 (on appeal (1842) 3 Mont D & De G 40); *Morris v Moss* (1855) 25 LJCh 194; *Davies v Hodgson* (1858) 25 Beav 177; *Churton v Douglas* (1859) John 174 at 187; *Mellersh v Keen* (1859) 27 Beav 236; *Smith v Everett* (1859) 27 Beav 446 at 452; *Mellersh v Keen (No 2)* (1860) 28 Beav 453; *Hall v Barrows* (1863) 4 De GJ & Sm 150 at 159; *Johnson v Helleley* (1864) 2 De GJ & Sm 446, where the form of advertisement settled by the court on the sale of a partnership business emphasised the right of the partners to carry on a similar business; *Hudson v Osborne* (1869) 39 LJCh 79 at 82; *Reynolds v Bullock* (1878) 47 LJCh 773; *Steuart v Gladstone* (1879) 10 ChD 626 at 662, CA, per Bramwell LJ; *Leggott v Barrett* (1880) 15 ChD 306, CA; *Mogford v Courtenay* (1881) 45 LT 303; *Taylor v Neate* (1888) 39 ChD 538 at 542; *Page v Ratcliffe* (1897) 76 LT 63, CA; *Jennings v Jennings* [1898] 1 Ch 378 at 382; *Re David and Matthews* [1899] 1 Ch 378; *Curl Bros Ltd v Webster* [1904] 1 Ch 685. However, where partners have agreed to dissolve and sell the goodwill one partner may not, pending the sale, carry on the partnership business on his own account to the prejudice of the partnership property: *Turner v Major* (1862) 3 Giff 442. As to the rights of partners to the goodwill generally see **PARTNERSHIP** vol 79 (2008) PARAS 172, 213-217.

2 *Shackle v Baker* (1808) 14 Ves 468; *Cruttwell v Lye* (1810) 17 Ves 335 at 341 per Lord Eldon LC; *Harrison v Gardener* (1817) 2 Madd 198.

3 *Trego v Hunt* [1896] AC 7, HL. See also *Hudson v Osborne* (1869) 39 LJCh 79 at 82; *Hookham v Pottage* (1872) 8 Ch App 91. It is, of course, otherwise if he has agreed to the contrary, as in *Wolmershausen v O'Connor* (1877) 36 LT 921.

4 *Trego v Hunt* [1896] AC 7 at 21, HL. See also *Shackle v Baker* (1808) 14 Ves 468; *Cruttwell v Lye* (1810) 17 Ves 335 RC 342; *Harrison v Gardner* (1817) 2 Madd 198; *Rodgers v Nowill* (1853) 3 De GM & G 614; *Churton v Douglas* (1859) John 174 at 193; *Hudson v Osborne* (1869) 39 LJCh 79; *Leggott v Barrett* (1880) 15 ChD 306 at 315, CA; *Mogford v Courtenay* (1881) 45 LT 303; *Vernon v Hallam* (1886) 34 ChD 748 at 752; *Curl Bros Ltd v Webster* [1904] 1 Ch 685; *May v May* (1914) 31 RPC 325, DC. This prohibition applies to a bankrupt whose business has been sold by his trustee: *Hudson v Osborne* (1869) 39 LJCh 79; see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 424.

5 *Hudson v Osborne* (1869) 39 LJCh 79. Registered trade marks are assignable and transmissible with or without the goodwill of a business: see the Trade Marks Act 1994 s 24(1); and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 129.

6 This applies also to a partner where by the terms of his agreement the goodwill belongs to the other partner: see the text and note 7; and **PARTNERSHIP** vol 79 (2008) PARA 213.

7 *Trego v Hunt* [1896] AC 7, HL (overruling *Pearson v Pearson* (1884) 27 ChD 145, CA; *Vernon v Hallam* (1886) 34 ChD 748, and *Collier v Chadwick* (1886) cited in 34 ChD at 751-752, CA, and approving *Labouchere v Dawson* (1872) LR 13 Eq 322, and *Ginesi v Cooper & Co* (1880) 14 ChD 596, except in so far as the injunction in that case prevented the defendant from issuing public advertisements or dealing with old customers at all). See also *Leggott v Barrett* (1880) 15 ChD 306, CA; *Walker v Mottram* (1881) 19 ChD 355, CA (disapproving *Ginesi v Cooper & Co* (1880) 14 ChD 596, in so far as it prohibited dealing with old customers); *Mogford v Courtenay* (1881) 45 LT 303; *West London Syndicate v IRC* [1898] 2 QB 507 at 523, CA, per Rigby LJ; *Jennings v Jennings* [1898] 1 Ch 378 at 382; *Gillingham v Beddow* [1900] 2 Ch 242; *Gargan v Ruttle* [1931] IR 152. Quaere whether the vendor of goodwill may solicit potential customers of the business prior to the sale, on which point there is no authority. An express provision authorising the vendor to set up a similar business may be such as to allow him to solicit old customers, however, and to this extent *Pearson v Pearson* (1884) 27 ChD 145, CA, is not overruled by *Trego v Hunt* [1896] AC 7, HL: see *Jennings v Jennings* [1898] 1 Ch 378 at 385; *Re David and Matthews* [1899] 1 Ch 378; *Gillingham v Beddow* [1900] 2 Ch 242 at 244. The prohibition extends to executors carrying out a contract for the sale of a business entered into by the testator (*Boorne v Wicker* [1927] 1 Ch 667), but it does not extend to a bankrupt whose business has been sold by his trustee (*Walker v Mottram* (1881) 19 ChD 355, CA), or to the original owner of property assigned to a trustee for the benefit of creditors (*Green & Sons (Northampton) Ltd v Morris* [1914] 1 Ch 562), even if the debtor covenants to aid to the utmost of his power the realisation of the property (*Farey v Cooper* [1927] 2 KB 384, CA), apparently because the sale or assignment is involuntary in such cases (see *Jennings v Jennings* [1898] 1 Ch 378 at 383, 389-390; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 424). If the trustee of the bankrupt has actively helped to deprive the purchaser of the benefit of his contract by assisting the bankrupt to start again in trade, it may be a question whether the purchaser is, as against the trustee, bound to carry out his contract: see *Cruttwell v Lye* (1810) 17 Ves 335 at 347 per Lord Eldon LC. A partner expelled from a partnership is, apparently, in the same position as a bankrupt or other involuntary vendor: *Dawson v Beeson* (1882) 22 ChD 504, CA; see **PARTNERSHIP** vol 79 (2008) PARA 213.

8 *Labouchere v Dawson* (1872) LR 13 Eq 322; *Leggott v Barrett* (1880) 15 ChD 306, CA; *Trego v Hunt* [1896] AC 7 at 12-13, HL, per Lord Herschell, and at 23 per Lord Macnaghten.

9 *Leggott v Barrett* (1880) 15 ChD 306 at 316, CA, per Cotton LJ. Apparently, damages may be given for such first solicitation, although there will be no injunction against the subsequent dealing, and, apparently, he may not solicit such persons who have come unsolicited if they remain customers of the old firm: *Leggott v Barrett*; *Curl Bros Ltd v Webster* [1904] 1 Ch 685.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(2) SALE OF GOODWILL/376. Goodwill apart from premises.

### 376. Goodwill apart from premises.

An agreement to sell goodwill unconnected with any premises is probably too uncertain to be enforced by specific performance<sup>1</sup>, but specific performance will be decreed of an agreement to sell a goodwill mainly or entirely annexed to premises which are sold with it<sup>2</sup>.

1 *Bozon v Farlow* (1816) 1 Mer 459 (specific performance of an agreement to purchase an attorney's business refused); *Baxter v Conolly* (1820) 1 Jac & W 576 at 580 per Lord Eldon LC; *Coslake v Till* (1826) 1 Russ 376; *May v Thomson* (1882) 20 ChD 705, CA, where Jessel MR, during the argument, at 715, doubted whether an agreement to sell a medical practice could be specifically enforced, although specific performance was refused on the ground that there was no concluded agreement; *Thornbury v Beville* (1842) 1 Y & C Ch Cas 554, where it was doubted whether specific performance could be decreed of an agreement by one solicitor to permit another to use his name, although such an agreement is not illegal. But in *Cooper v Hood* (1858) 26 Beav 293 at 299, Romilly MR was of opinion that a contract for sale of 'goodwill etc' might not be too uncertain for specific performance, although specific performance was refused on the ground of other uncertainties, and in *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL, specific performance was ordered in favour of the personal representative of the vendor of a contract for the sale of goodwill without business premises: see **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 844 et seq. In relation to goodwill and a solicitor's business see also *Arundell v Bell* (1883) 52 LJCh 537, CA; and **LEGAL PROFESSIONS** vol 66 (2009) PARA 785. As to prohibitions on the sale of goodwill of medical practices in the national health service see **HEALTH SERVICES** vol 54 (2008) PARA 273 et seq.

2 *Dakin v Cope* (1827) 2 Russ 170; *Darbey v Whitaker* (1857) 4 Drew 134 at 139. See also *IRC v G Angus & Co*, *IRC v Lewis* (1889) 23 QBD 579 at 593, CA, per Lord Esher MR.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/377. Freedom of trade.

## (3) RESTRAINT OF TRADE

### (i) Introduction

#### 377. Freedom of trade.

It is a general principle of the common law that a man is entitled to exercise any lawful trade or calling as and where he wills<sup>1</sup>, and the law has always regarded jealously any interference with trade, even at the risk of interference with freedom of contract<sup>2</sup>, as it is public policy<sup>3</sup> to oppose all restraints upon liberty of individual action which are injurious to the interests of the state<sup>4</sup>. The principle is not confined to restraint of trade in the ordinary meaning of the word 'trade'<sup>5</sup>. Moreover, it extends to contracts restricting the way in which a tradesman carries on his business on a piece of land<sup>6</sup>, and to restraints imposed by the rules or practices of professional or other bodies controlling particular activities<sup>7</sup>.

In upholding freedom to trade, public authorities should not distinguish between lawful trades<sup>8</sup>.

1 See PARA 378 et seq; and **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 876.

2 *Mitchel v Reynolds* (1711) 1 P Wms 181 at 187; *Homer v Ashford and Ainsworth* (1825) 3 Bing 322 at 326 per Best CJ; *R v Batt* (1834) 6 C & P 329; *Hilton v Eckersley* (1855) 6 E & B 47 (affd (1856) 6 E & B 66 at 75, Ex Ch; approved in *Quinn v Leathem* [1901] AC 495 at 525, HL, per Lord Brampton); *R v Druiitt, Lawrence and Adamson* (1867) 10 Cox CC 592 at 600; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 552, HL, per Lord Watson; *Trego v Hunt* [1896] AC 7 at 24, HL, per Lord Macnaghten; *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 308, CA, per Rigby LJ; *Quinn v Leathem* [1901] AC 495 at 534, HL, per Lord Lindley; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 738, HL, per Lord Shaw of Dunfermline; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 793, PC; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 699, HL, per Lord Atkinson; *McEllistirm v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548 at 571, HL, per Lord Finlay; cf *Mogul Steamship Co v McGregor, Gow & Co* [1892] AC 25 at 36, HL, per Lord Halsbury LC. See also *Hughes v Architects' Registration Council of the United Kingdom* [1957] 2 QB 550 at 563, [1957] 2 All ER 436 at 443, DC, per Devlin J.

3 See *Nagle v Feilden* [1966] 2 QB 633, [1966] 1 All ER 689, CA (practice of the Jockey Club to refuse to grant training licences to women). As to public policy generally see *Richardson v Mellish* (1824) 2 Bing 229; *Egerton v Earl Brownlow* (1853) 4 HL Cas 1; *Fender v St John-Mildmay* [1938] AC 1 at 38, [1937] 3 All ER 402 at 424, HL, per Lord Wright; *Giles v Thompson* [1993] 3 All ER 321, CA, per Steyn LJ at 333-336 (affd [1994] 1 AC 142, [1993] 3 All ER 321, HL). It is not against public policy as being in restraint of trade for a divorce petitioner, with a view to protecting the respondent's honour, to bind a co-respondent by agreement not to come for a period of years within a certain area, although it is conceivable that in some cases a covenant having apparently no reference to trade may be a colourable device in restraint of trade: *Upton v Henderson* (1912) 106 LT 839. As to agreements contrary to public policy generally see **CONTRACT** vol 9(1) (Reissue) PARA 841 et seq. Political policy must be distinguished: see **CONTRACT** vol 9(1) (Reissue) PARA 842.

4 *Horner v Graves* (1831) 7 Bing 735 at 743; *Wallis v Day* (1837) 2 M & W 273; *Whittaker v Howe* (1841) 3 Beav 383 (questioned, but not on this point, in *Tallis v Tallis* (1853) 1 E & B 391); *Leather Cloth Co v Lonsont* (1869) LR 9 Eq 345; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 552, HL; *Tivoli, Manchester, Ltd v Colley* (1904) 20 TLR 437; *Russell v Amalgamated Society of Carpenters and Joiners* [1910] 1 KB 506 at 516, CA (affd [1912] AC 421, HL). See also *AG Spalding & Bros v AW Gamage Ltd and Benetfink & Co Ltd* [1913] 29 TLR 541. This point was not considered in the Court of Appeal ((1914) 110 LT 530) or in the House of Lords ((1915) 84 LJCh 449). See generally the cases cited in notes 3, 5, and cases on restraint of trade in PARA 381 et seq.

5 See *Hepworth Manufacturing Co Ltd v Ryott* [1920] 1 Ch 1 at 26, CA, per Atkin LJ, where a covenant by a film actor not to use a pseudonym by which he was known while in the plaintiffs' employ was held to be in restraint of trade. See also *Neville v Dominion of Canada News Co Ltd* [1915] 3 KB 556, CA, where a covenant by a newspaper not to comment on the covenantees' business was held to be in restraint of trade; *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, [1963] 3 All ER 139 (restraints on professional footballers); *Nagle v Feilden* [1966] 2 QB 633, [1966] 1 All ER 689, CA (see note 3); *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL (song-writer's agreement to provide exclusive services to publishers); *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237, [1975] 1 WLR 61, CA (song-writers' agreement to assign world-wide copyright for a period of 5 years, extendable to 10); *Greig v Insole* [1978] 3 All ER 449, [1978] 1 WLR 302 (restraints on professional cricketers). The doctrine may apply to an agreement for the acquisition of a franchise: see *Budget Rent a Car International Inc v Mamos Slough Ltd* (1977) 121 Sol Jo 374, CA. As to the ordinary meaning of 'trade' see PARA 369. The early cases on customs and byelaws repeatedly state the general principle: see *Davenant v Hurd* (1598) Moore KB 576 (referred to in *Case of Monopolies* (1602) 11 Co Rep 84b at 86a); *Case of Monopolies*; *Ipswich Taylors' Case* (1614) 11 Co Rep 53a; *Norris v Staps* (1616) Hob 210 at 211; *Hesketh v Braddock* (1766) 3 Burr 1847; *R v Coopers' Co, Newcastle* (1798) 7 Term Rep 543; *R v Tappenden* (1802) 3 East 186; *Clark v Le Cren* (1829) 9 B & C 52 at 58 per Bayley J. On the same principle 5 Eliz 1 c 4 (Artificers and apprentices) (1562-3) (repealed), which forbade the exercise etc of certain trades without previous apprenticeship, was construed strictly: *R v Turnith* (1669) 1 Mod Rep 26; *Raynard v Chase* (1756) 1 Burr 2 at 6. In *R v Maddox* (1706) 2 Salk 613, that Act was described as 'a hard law'. As to the treatment for tax purposes of the consideration for a restrictive covenant by an office holder or employee see **INCOME TAXATION** vol 23(1) (Reissue) PARAS 194, 687.

6 *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, [1966] 1 All ER 126, CA (solus agreement in gross, restricting the supply of motor fuel to one particular supplier). See also *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL, where the doctrine was held to apply to covenants in a mortgage. But the doctrine does not apply where a person enters into possession under a lease containing restrictive covenants: *Cleveland Petroleum Co Ltd v Dartstone Ltd* [1969] 1 All ER 201, [1969] 1 WLR 116, CA. As to the treatment of 'land agreements' under the Competition Act 1998 see PARAS 142, 143.

7 See *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, [1963] 3 All ER 139; *Nagle v Feilden* [1966] 2 QB 633, [1966] 1 All ER 689, CA; *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403, [1968] 2 All ER 686, HL; *Greig v Insole* [1978] 3 All ER 449, [1978] 1 WLR 302; *Watson v Prager* [1991] 3 All ER 487, [1991] 1 WLR 726, EAT. Restraints may also result from agreements between employers: see *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108, [1958] 2 All ER 65, CA; and PARA 388 note 1. As to restrictions on the professions and trades which may be carried on by a barrister see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1033 et seq; as to fellows and members of the Royal College of Physicians see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 64.

8 See *R v Coventry City Council, ex p Phoenix Aviation* [1995] 3 All ER 37, DC.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/378. Classification of restraints.

### 378. Classification of restraints.

Restraints upon the general freedom to trade may be roughly divided into restraints imposed on a person by statute<sup>1</sup>, by operation of law<sup>2</sup>, by agreement<sup>3</sup> and by the rules or practices of professional or other bodies controlling particular activities<sup>4</sup>.

1 See PARAS 379-380.

2 See PARA 381.

3 See PARA 382.

4 See PARA 382.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/379. Restraints by statute.

### 379. Restraints by statute.

Restraints of trade by statute<sup>1</sup> include all those cases in which certain trades have been absolutely forbidden by Parliament<sup>2</sup>, or in which restrictions have been imposed by Parliament on the carrying on of particular trades and professions with a view to the maintenance of a proper standard of competence in, and a proper control over, those engaged in them<sup>3</sup>, or with a view to the protection of employees and the public<sup>4</sup> or public order<sup>5</sup>, or the public health and safety<sup>6</sup>, or for purposes of revenue<sup>7</sup>. The legislature has also interfered to restrict traders from themselves imposing restraints<sup>8</sup>, and important provisions in the law of the European Union also must be considered<sup>9</sup>.

1 In this title such cases only are dealt with as are not conveniently grouped under other headings, and for particular cases reference should be made to the appropriate titles. As to byelaws in restraint of trade see **LOCAL GOVERNMENT** vol 69 (2009) PARA 565; and as to such byelaws by corporations see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1196.

2 Eg the slave trade: see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARAS 824-825.

3 Eg the professions of doctors, dentists, nurses and midwives, opticians, dispensers of hearing aids, chemists and apothecaries (see **MEDICAL PROFESSIONS** vol 30(1) (Reissue) PARA 1 et seq); and solicitors (see **LEGAL PROFESSIONS** vol 65 (2008) PARA 600 et seq).

4 See eg the Health and Safety at Work etc Act 1974 (see **HEALTH AND SAFETY AT WORK** vol 52 (2009) para 302 et seq); the Consumer Credit Act 1974 (see **CONSUMER CREDIT**; see also **PLEDGES AND PAWNS** vol 36(1) (2007 Reissue) PARA 41); and the Weights and Measures Act 1985 (see **WEIGHTS AND MEASURES** vol 50 (2005 Reissue) PARA 1 et seq).

5 Eg intoxicating liquor (see **LICENSING AND GAMBLING**), and pedlars (see **MARKETS, FAIRS AND STREET TRADING** vol 29(2) (Reissue) PARA 1117 et seq).

6 Eg the sale of food (see **FOOD** vol 18(2) (Reissue) PARA 201 et seq), of explosives (see **EXPLOSIVES** vol 17(2) (Reissue) PARAS 921 et seq, 971 et seq), of firearms (see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(2) (2006 Reissue) PARA 630 et seq), of medicinal products, controlled drugs and of poisons (see **MEDICINAL PRODUCTS AND DRUGS** vol 30(2) (Reissue) PARAS 237 et seq, 284 et seq); see also the Consumer Protection Act 1987 Pt II (ss 11-19) for wide powers to impose restraints in the interest of consumer safety (see **SALE OF GOODS AND SUPPLY OF SERVICES** vol 41 (2005 Reissue) PARA 528 et seq).

7 See **LICENSING AND GAMBLING; CUSTOMS AND EXCISE** vol 12(3) (2007 Reissue) PARA 896 et seq.

8 See PARA 365 et seq.

9 See the EC Treaty arts 81, 82; and PARAS 4, 61 et seq, 68 et seq. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/380. Restraints by statute: reform of law which imposes burdens.

### **380. Restraints by statute: reform of law which imposes burdens.**

A minister of the Crown<sup>1</sup> may by order<sup>2</sup> make any provision which he considers would remove or reduce any burden<sup>3</sup>, or the overall burdens, resulting directly or indirectly for any person from any legislation<sup>4</sup>. The provision that may be made includes: (1) provision abolishing, conferring or transferring, or providing for the delegation of, functions of any description; (2) provision creating or abolishing a body or office, and provision made by amending or repealing any enactment<sup>5</sup>.

A minister of the Crown may also by order<sup>6</sup> make any provision which he considers would secure that regulatory functions<sup>7</sup> are exercised so as to comply with the principles that: (a) regulatory activities should be carried out in a way which is transparent, accountable, proportionate and consistent; (b) regulatory activities should be targeted only at cases in which action is needed<sup>8</sup>. The provision that may be made includes: (i) provision modifying the way in which a regulatory function is exercised by any person; (ii) provision amending the constitution of a body exercising regulatory functions which is established by or under an enactment; (iii) provision transferring, or providing for the delegation of, the regulatory functions conferred on any person<sup>9</sup>, and provision made by amending or repealing any enactment<sup>10</sup>.

A minister may not make such provision<sup>11</sup>, other than provision which merely restates an enactment<sup>12</sup>, unless he considers that the following conditions, where relevant, are satisfied in relation to that provision:

- (A) the policy objective intended to be secured by the provision could not be satisfactorily secured by non-legislative means;
- (B) the effect of the provision is proportionate to the policy objective;

- (c) the provision, taken as a whole, strikes a fair balance between the public interest and the interests of any person adversely affected by it;
- (d) the provision does not remove any necessary protection;
- (E) the provision does not prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise;
- (F) the provision is not of constitutional significance<sup>13</sup>.

1 As to the meaning of 'Minister of the Crown' see the Ministers of the Crown Act 1975 (see **CONSTITUTIONAL LAW AND HUMAN RIGHTS**); definition applied by the Legislative and Regulatory Reform Act 2006 s 32(1).

2 Such an order must be made by statutory instrument in accordance with the Legislative and Regulatory Reform Act 2006 Pt 1 (ss 1-20): ss 1(10), 12(1). It may contain such consequential, supplementary, incidental or transitional provision (including provision made by amending or repealing any enactment or other provision) as the minister making it considers appropriate: s 1(8). An order may bind the Crown: s 1(9). A minister may not make such an order unless: (1) he has consulted in accordance with s 13; (2) following that consultation, he has laid a draft order and explanatory document before Parliament in accordance with s 14; and (3) the order is made, as determined under s 15, in accordance with: (a) the negative resolution procedure (see s 16); (b) the affirmative resolution procedure (see s 17); or (c) the super-affirmative resolution procedure (see s 18): s 12(2).

3 'Burden' means any of the following: (1) a financial cost; (2) an administrative inconvenience; (3) an obstacle to efficiency, productivity or profitability; or (4) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity: Legislative and Regulatory Reform Act 2006 s 1(3). A financial cost or administrative inconvenience may result from the form of any legislation (for example, where the legislation is hard to understand): s 1(5). Provision may not be made in relation to any burden which affects only a minister of the Crown or government department, unless it affects the minister or department in the exercise of a regulatory function: s 1(4). As to the meaning of 'regulatory function' see note 7.

4 Legislative and Regulatory Reform Act 2006 s 1(1), (2). 'Legislation' means any of the following or a provision of any of the following: (1) a public general Act or local Act, whenever passed; (2) a Measure or Act of the National Assembly for Wales; or (3) any Order in Council, order, rules, regulations, scheme, warrant, byelaw or other subordinate instrument made at any time under an Act referred to in head (1), or a Measure or Act of the National Assembly for Wales, but does not include any instrument which is, or is made under, Northern Ireland legislation: Legislative and Regulatory Reform Act 2006 s 1(6) (amended by SI 2007/1388).

5 Legislative and Regulatory Reform Act 2006 s 1(7). As to subordinate legislation see s 4 (amended by SI 2007/1388). An order under the Legislative and Regulatory Reform Act 2006 Pt 1 may not make provision to impose, abolish or vary any tax (see the Legislative and Regulatory Reform Act 2006 s 5); nor must it create or significantly affect criminal penalties (see s 6) or allow forcible entry (see s 7). An order may not make provision amending or repealing any provision of the Legislative and Regulatory Reform Act 2006 Pt 1 or the Human Rights Act 1998: Legislative and Regulatory Reform Act 2006 s 8. An order under Pt 1 may not, except by virtue of s 1(8) (see note 2) or s 2(7) (see note 6), make provision which would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament (Legislative and Regulatory Reform Act 2006 s 9), make provision to amend or repeal any Northern Ireland legislation (s 10), or, except with the agreement of the National Assembly for Wales, make provision which would be within the legislative competence of the Assembly (see s 11 (substituted by SI 2007/1388)).

6 Such an order must be made in accordance with the Legislative and Regulatory Reform Act 2006 Pt 1; may bind the Crown; and may contain such consequential, supplementary, incidental or transitional provision (including provision made by amending or repealing any enactment or other provision) as the minister making it considers appropriate: s 2(7)-(9).

7 'Regulatory function' means: (1) a function under any enactment of imposing requirements, restrictions or conditions, or setting standards or giving guidance, in relation to any activity; or (2) a function which relates to the securing of compliance with, or the enforcement of, requirements, restrictions, conditions, standards or guidance which under or by virtue of any enactment relate to any activity: Legislative and Regulatory Reform Act 2006 s 32(2). In heads (1) and (2) the references to a function include a function exercisable by or on behalf of the Crown but do not include any function exercisable by any body of, or any person holding office in, the Church of England, or any function of conducting criminal or civil proceedings: s 32(3). References to an activity include providing goods and services and employing or offering employment to any person: s 32(4). As to the exercise of regulatory functions see ss 21-24 (s 24 amended by SI 2007/1388).

8 Legislative and Regulatory Reform Act 2006 s 2(1)-(3). The provision that may be made does not include provision conferring any new regulatory function or abolishing any regulatory function: s 2(6). The following

order has been made under this provision: see the Legislative Reform (Health and Safety Executive) Order 2008, SI 2008/960; and **HEALTH AND SAFETY AT WORK** vol 52 (2009) PARA 361.

9 The provision referred to in head (iii) in the text includes provision: (1) to create a new body to which, or a new office to the holder of which, regulatory functions are transferred; (2) to abolish a body from which, or office from the holder of which, regulatory functions are transferred: Legislative and Regulatory Reform Act 2006 s 2(5).

10 Legislative and Regulatory Reform Act 2006 s 2(4). As to the making of orders under Pt 1 see note 5.

11 le under the Legislative and Regulatory Reform Act 2006 s 1(1) or s 2(1).

12 To 'restate' an enactment means to replace it with alterations only of form or arrangement (and for these purposes to remove an ambiguity is to make an alteration other than one of form or arrangement): Legislative and Regulatory Reform Act 2006 s 3(5). A minister may not make provision which merely restates an enactment unless he considers that the provision made would make the law more accessible or more easily understood: s 3(3), (4).

13 Legislative and Regulatory Reform Act 2006 s 3(1), (2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/381. Restraints by operation of law.

### **381. Restraints by operation of law.**

Restraints may be imposed on a person by operation of law when one trader is given confidential information by another; apart from any contract, he is not entitled to use the information for the purposes of trade by way of competition with the other trader<sup>1</sup>.

1 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413n, CA; *Peter Pan Manufacturing Corpn v Corsets Silhouette Ltd* [1963] 3 All ER 402, [1964] 1 WLR 96. See also PARAS 409-410; **EQUITY** vol 16(2) (Reissue) PARA 855; and **CIVIL PROCEDURE** vol 11 (2009) PARA 331 et seq. The relief which may be obtained for a breach of the obligation of confidence includes an injunction, an account of profits or damages, and delivery up or destruction of offending goods: *Peter Pan Manufacturing Corpn v Corsets Silhouette Ltd*. As to the scope of an inquiry as to damages see *National Broach and Machine Co v Churchill Gear Machines Ltd* [1965] 2 All ER 961, [1965] 1 WLR 1199, CA; affd sub nom *Churchill Gear Machines Ltd v National Broach and Machine Co* [1966] 3 All ER 923n, [1967] 1 WLR 384, HL. See *Seager v Copydex Ltd* [1967] 2 All ER 415, [1967] 1 WLR 923, CA, where damages were awarded for the use of an unpatented invention disclosed during abortive negotiations; see further *Seager v Copydex Ltd (No 2)* [1969] 2 All ER 718, [1969] 1 WLR 809, CA; *Dowson and Mason Ltd v Potter* [1986] 2 All ER 418, [1986] 1 WLR 1419, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/382. Restraints by agreement and by professional or other bodies.

### **382. Restraints by agreement and by professional or other bodies.**

Restraints may be imposed by agreement or by the rules or practices of professional or other bodies controlling particular activities<sup>1</sup>. A person may be restrained from carrying on his trade by reason of an agreement voluntarily entered into by him with that object<sup>2</sup>. In such a case the general principle of freedom of trade<sup>3</sup> must be applied with due regard to the principles that public policy requires for persons of full age and understanding the utmost freedom to

contract<sup>4</sup>, and that it is public policy to allow a trader to dispose of his business to a successor by whom it may be efficiently carried on<sup>5</sup>, and to afford to an employer an unrestricted choice of able assistants and the opportunity to instruct them in his trade and its secrets without fear of their becoming his competitors<sup>6</sup>.

1 Restraint by custom, when not abolished by statute, is now obsolete: see **CUSTOM AND USAGE** vol 12(1) (Reissue) PARA 646. The law of involuntary restraint by Crown grants is now governed by statute (see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 302 et seq), as is in practically all cases the law of restraint by byelaw, and the distinction between general and partial voluntary restraints has disappeared: see PARA 387. As to trade combinations see the cases cited in PARA 432 note 75.

2 Apart from agreement a retiring partner or the vendor of a business is at liberty to start a competing business: see PARA 375; and **PARTNERSHIP** vol 79 (2008) PARAS 172, 213 et seq. See *WWF-World Wide Fund for Nature (formerly World Wildlife Fund) v World Wrestling Federation Entertainment Inc* [2002] EWCA Civ 196, [2002] FSR 530 (agreement concluded as part of dispute settlement presumed to be sound unless proved otherwise by defendant).

3 See PARA 377.

4 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462; *Middleton v Brown* (1878) 47 LJCh 411, CA; *Rousillon v Rousillon* (1880) 14 ChD 351 at 365; *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447 at 452; *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 at 310; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, PC; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 697, HL, per Lord Atkinson; *Attwood v Lamont* [1920] 3 KB 571 at 577, CA, per Lord Sterndale MR; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 304-305, [1967] 1 All ER 699 at 711-712, HL, per Lord Morris of Borth-y-Gest. See also *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513, [1972] 1 WLR 814.

5 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 552, HL, per Lord Watson; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 738, HL, per Lord Shaw of Dunfermline. Cf *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 310, CA, per Vaughan Williams LJ in his dissenting judgment. See also *Broad v Jollyfe* (1620) Cro Jac 596; *Anon* (1641) March 77; *Prugnell v Gosse* (1648) Aleyn 67; *Mitchel v Reynolds* (1711) 1 P Wms 181 at 187; *Homer v Ashford and Ainsworth* (1825) 3 Bing 322; *Horner v Graves* (1831) 7 Bing 735 at 742; *Mallan v May* (1843) 11 M & W 653; *Leather Cloth Co v Lonsont* (1869) LR 9 Eq 345; *Vernon v Hallam* (1886) 34 ChD 748; *Connors Bros Ltd v Connors* [1940] 4 All ER 179 at 190-191, PC. A trade or business may be sold even though it depends upon the personal character of the man who carries it on: see PARA 414.

6 *Homer v Ashford and Ainsworth* (1825) 3 Bing 322 at 326; *Mallan v May* (1843) 11 M & W 653 at 666 per Parke B; *Mumford v Gething* (1859) 7 CBNS 305 at 319 per Erle CJ; *Fitch v Dewes* [1921] 2 AC 158 at 162-167, HL, per Lord Birkenhead LC. Note, however, that it is not lawful to impose a covenant against competition simpliciter: this is legitimate only to the extent that the covenantee has an interest meriting protection; see PARA 389.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/383. Restraints of trade contrary to public policy.

### 383. Restraints of trade contrary to public policy.

A restraint of trade will be contrary to public policy unless the person imposing the restraint has a legitimate interest meriting protection<sup>1</sup>, the restraint is reasonable as between the parties<sup>2</sup> and the restraint is reasonable in the public interest<sup>3</sup>.

Contracts in restraint of trade are prima facie void. The onus of proof is on the party supporting the contract to show that the restraint goes no further than is reasonably necessary to protect a legitimate interest of the covenantee meriting protection<sup>4</sup>. If this onus is discharged, the onus of showing that the restraint is nevertheless injurious to the public is on the party attacking the



contract<sup>5</sup>. Contracts in restraint of trade are unenforceable, but not unlawful or illegal<sup>6</sup>. A third party cannot bring an action for damages against the parties to an agreement in unreasonable restraint of trade<sup>7</sup>. However, a declaration may be obtainable<sup>8</sup>, as may an interim or final injunction<sup>9</sup>. An action may lie in respect of agreements that infringe the Chapter I prohibition in the Competition Act 1998<sup>10</sup> or the competition provisions in the EC Treaty<sup>11</sup>.

In order to be valid, a contract in restraint of trade must, apart from satisfying the test of reasonableness between the parties and in the public interest, also satisfy the following conditions: (1) it must be founded on good consideration<sup>12</sup>; and (2) it must not be too vague<sup>13</sup>.

1 See PARA 389.

2 See PARA 390 et seq.

3 See PARA 412.

4 *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 733, HL, per Lord Haldane LC; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 700, HL, per Lord Atkinson, and at 707 per Lord Parker of Waddington; *Attwood v Lamont* [1920] 3 KB 571 at 587, CA, per Younger LJ; *Hepworth Manufacturing Co Ltd v Ryott* [1920] 1 Ch 1 at 26, CA, per Atkin LJ; *Putsman v Taylor* [1927] 1 KB 637 at 645, DC, per Talbot J (on appeal [1927] 1 KB 741, CA); *Gilford Motor Co Ltd v Home* [1933] Ch 935 at 946, CA, per Foxwell J, and at 966 per Romer LJ; *Triplex Safety Glass Co v Scorah* [1938] Ch 211 at 215, [1937] 4 All ER 693 at 697 per Farwell J; *Routh v Jones* [1947] 1 All ER 758 at 763, CA, where Lord Greene MB preferred the dicta of Lord Parker of Waddington and of Younger LJ, referred to in this note, to that of Lord Birkenhead LC in *Fitch v Dewes* [1921] 2 AC 158 at 162, HL. The proposition is inconsistent with earlier authority: see *Eastes v Russ* [1914] 1 Ch 468 at 475, CA, per Cozens-Hardy MR; *Fitch v Dewes* at 162; see also the text and note 5. As to illegality of contract generally see **CONTRACT** vol 9(1) (Reissue) PARA 836 et seq.

5 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 700, 708, HL. The distinction is probably of little practical significance: 'The reason for the distinction may be obscure, but it will seldom arise since once the agreement is before the court it is open to the scrutiny of the court in all its surrounding circumstances as a question of law': *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 319, [1967] 1 All ER 699 at 721, HL, per Lord Hodson. See also *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513, [1972] 1 WLR 814.

6 *Mogul Steamship Co Ltd v McGregor, Gow & Co* [1892] AC 25, HL; *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL; *Brekkes Ltd v Cattell* [1972] Ch 105, [1971] 1 All ER 1031; cf *Cooke v Football Association* [1972] CLY 516; *R v General Medical Council, ex p Colman* [1990] 1 All ER 489 at 508, CA, per Ralph Gibson LJ ('An unreasonable restraint of trade by contract is not itself an illegal provision. It is unenforceable because contrary to public policy'); *Boddington v Lawton* [1994] ICR 478.

7 *Mogul Steamship Co v McGregor, Gow and Co* [1892] AC 25, HL.

8 *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, [1963] 3 All ER 139; *Dickson v Pharmaceutical Society of Great Britain* [1967] Ch 708, [1967] 2 All ER 558, CA; affd sub nom *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403, [1968] 2 All ER 686, HL; *Blackler v New Zealand Rugby Football League Inc* [1968] NZLR 547, NZ CA; *Greig v Insole* [1978] 3 All ER 449, [1978] 1 WLR 302; *McInnes v Onslow Fane* [1978] 3 All ER 211, [1978] 1 WLR 1520; *Hughes v Western Australian Cricket Association Inc* (1986) 69 ALR 660, Aust Fed Ct.

9 *Nagle v Feilden* [1966] 2 QB 633, [1966] 1 All ER 689, CA; *Newport Association Football Club Ltd v Football Association of Wales Ltd* [1995] 2 All ER 87.

10 Ie in the Competition Act 1998. See PARA 116 et seq.

11 Ie the EC Treaty art 81: see PARAS 4, 61 et seq. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

12 See PARAS 413-416.

13 See PARA 423.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/384. Judicial notice of restraint of trade.

### **384. Judicial notice of restraint of trade.**

As a general rule, the point that a contract is unenforceable as being in restraint of trade is not one that the court is entitled to take of its own initiative unless it is raised on the pleadings<sup>1</sup>. However, a contract in restraint of trade may on the face of it be so unreasonable as between the parties, or so detrimental to the public, that if the court has before it evidence of all the surrounding circumstances it may on its own initiative refuse to enforce it, even though the matter is not pleaded<sup>2</sup>.

1 *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 at 180, [1966] 1 All ER 126 at 137, CA, per Diplock LJ; *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 233.

2 *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461 at 476, HL, per Lord Moulton, and at 478 per Lord Parker of Waddington. As to judicial notice of illegality generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 782.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(i) Introduction/385. Domestic and European Union competition law.

### **385. Domestic and European Union competition law.**

Restraints subject to the restraint of trade doctrine may attract the application of the domestic competition law of the United Kingdom<sup>1</sup> and the competition rules in the EC Treaty<sup>2</sup>.

1 In particular the Chapter I prohibition in the Competition Act 1998: see PARA 116 et seq.

2 In particular the EC Treaty art 81: see PARAS 4, 61 et seq. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmnd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(ii) Scope of the Restraint of Trade Doctrine/386. Development of the principle relating to restraint by agreement.

## **(ii) Scope of the Restraint of Trade Doctrine**

### **386. Development of the principle relating to restraint by agreement.**

Decisions on public policy are subject to change and development with the change and development of trade and the means of communication and the evolution of economic thought<sup>1</sup>. However, while the general principle once applicable to agreements in restraint of

trade has been considerably modified by later decisions, the old cases have not been rendered obsolete on such questions as consideration<sup>2</sup>, measurement of distance<sup>3</sup>, severability<sup>4</sup>, parties<sup>5</sup> and reasonableness of restraint generally<sup>6</sup>.

In the earliest times it would probably have been held that all contracts in restraint of trade, whether general or partial, were void, but the severity of this principle was gradually relaxed<sup>7</sup>, and it became the rule that a partial restraint might be good if reasonable<sup>8</sup>, although a general restraint was of necessity void<sup>9</sup>.

A restraint was regarded as general if it was unlimited as to space, that is, apparently, if it extended over the whole of the United Kingdom<sup>10</sup> or substantially so<sup>11</sup> (the extension of such restraint to foreign countries being immaterial<sup>12</sup>), even though limited as to time<sup>13</sup>. It was not, however, so regarded if, although unlimited as to space, it was limited as to the persons with whom the covenantor might deal<sup>14</sup>, or as to the manner in which or the name under which the trade might be carried on<sup>15</sup>, or, it appears, as to the capacity in which the covenantor might engage in the trade<sup>16</sup>. The mere fact that it was unlimited as to time did not constitute it a general restraint<sup>17</sup>.

1 *Archer v Marsh* (1837) 6 Ad & El 959; *Davies v Davies* (1887) 36 ChD 359 at 396, CA, per Fry LJ; *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447 at 452; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 553, HL, per Lord Watson; *Dubowski & Sons v Goldstein* [1896] 1 QB 478, CA; *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912) as reported in 107 LT 439 at 445, CA, per Farwell LJ; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 716, HL, per Lord Shaw of Dunfermline; *Bull v Pitney-Bowes Ltd* [1966] 3 All ER 384 at 388, [1967] 1 WLR 273 at 276. As to public policy see PARA 377 note 3; and **CONTRACT** vol 9(1) (Reissue) PARA 841 et seq.

2 See PARAS 413-416.

3 See PARA 402.

4 See PARAS 433-434.

5 See PARAS 417-419.

6 See PARA 390 et seq.

7 *Dier's Case* (1414) YB 2 Hen 5, fo 5, pl 26; *Colgate v Bachelier* (1602) Cro Eliz 872; *Broad v Jollyfe* (1620) Cro Jac 596; *Prugnell v Gosse* (1648) Aleyn 67; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 541, 556, 564, HL (affg sub nom *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630 at 647, CA); *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 at 309; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, PC.

8 *Rogers v Parrey* (1613) 2 Bulst 136; *Mitchel v Reynolds* (1711) 1 P Wms 181. The proposition will be found stated in practically all the cases on the subject.

9 *Dier's Case* (1414) YB 2 Hen 5, fo 5, pl 26 (where, however, there was fraud and compulsion: see *Broad v Jollyfe* (1620) Cro Jac 596; *Mitchel v Reynolds* (1711) 1 P Wms 181); *Colgate v Bachelier* (1602) Cro Eliz 872; *Ipswich Taylors' Case* (1614) 11 Co Rep 53a; *Anon* (1641) March 77; *Mitchel v Reynolds*; *Chesman v Nainby* (1727) 1 Bro Parl Cas 234, HL; *Gunmakers Co v Fell* (1742) Willes 384 at 388; *Davis v Mason* (1793) 5 Term Rep 118; *Shackle v Baker* (1808) 14 Ves 468; *Morris v Colman* (1812) 18 Ves 437 at 438 per Lord Eldon LC; *Harrison v Gardner* (1817) 2 Madd 198; *Bryson v Whitehead* (1822) 1 Sim & St 74 at 77 (trade secret: see PARA 409); *Homer v Ashford and Ainsworth* (1825) 3 Bing 322; *Wickens v Evans* (1829) 3 Y & J 318; *Hutton v Parker* (1839) 7 Dowl 739; *Exeter Co of Taylors v Clarke* (1684) 2 Show 345.

10 *Mitchel v Reynolds* (1711) 1 P Wms 181 at 182, where in describing a general restraint the words used were 'not to exercise a trade throughout the kingdom'. The law was not clear as to this, and in *Homer v Graves* (1831) 7 Bing 735, those words were said to be rather an instance than a limit of the application of the rule: see the cases cited in note 11.

11 In *Price v Green* (1847) 16 M & W 346, Ex Ch, 'London and 600 miles' (ie England, Wales, and nineteen-twentieths of Scotland) was treated as general (London being held severable: see PARAS 433-434). In *Jones v Lees* (1856) 1 H & N 189, 'England' was treated as general. In *Harms v Parsons* (1862) 32 Beav 328, a restraint covering England but not Scotland was treated as partial. In *Leather Cloth Co v Lorsche* (1869) LR 9 Eq 345 at 351, Great Britain was referred to as the test; cf *Ward v Byrne* (1839) 5 M & W 548. In *Rousillon v Rousillon*

(1880) 14 ChD 351 at 366, a restraint unlimited as to space was discussed on the basis that it extended to England and Wales; and in *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630 at 648, CA, Lindley LJ, and at 651 Bowen LJ, speak of England; although in [1894] AC 535 at 550, HL, Lord Herschell LC, and at 574, Lord Macnaghten, seem to refer to the United Kingdom.

12 In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 550, HL, Lord Herschell said that the courts in laying down the rule had reference only to the United Kingdom and would not have considered it against public policy to restrain a person who had sold his business from setting up a rival business in another country. Cf *Leather Cloth Co v Lorsche* (1869) LR 9 Eq 345 at 351. As to restraints extending beyond the United Kingdom see PARA 401.

13 *Dier's Case* (1414) YB 2 Hen 5, fo 5, pl 26; *Hunlocke v Blacklowe* (1670) 2 Saund 156; *Colmer v Clark* (1734) 7 Mod Rep 230; *M'Allen v Churchill* (1826) 11 Moore CP 483; *Ward v Byrne* (1839) 5 M & W 548; *Hinde v Gray* (1840) 1 Man & G 195; *Proctor v Sargent* (1840) 2 Man & G 20 at 33; *Davies v Davies* (1887) 36 ChD 359, CA; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 543, 553, HL; but see, contra, *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447 at 450 per Chitty J; *Davies v Davies* at 382 per Cotton LJ, and at 391 per Bowen LJ.

14 *Hunlocke v Blacklowe* (1670) 2 Saund 156; *Mitchel v Reynolds* (1711) 1 P Wms 181 at 185; *Gale v Reed* (1806) 8 East 80; *Nicholls v Stretton* (1843) 7 Beav 42 (subsequent proceedings (1847) 10 QB 346 at 350); *Rannie v Irvine* (1844) 7 Man & G 969; *May v O'Neill* (1875) 44 LJCh 660; *Collins v Locke* (1879) 4 App Cas 674, PC; *Baines v Geary* (1887) 35 ChD 154; *Mills v Dunham* [1891] 1 Ch 576, CA.

15 *Jones v Lees* (1856) 1 H & N 189. See also *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630 at 654, 657, CA, per Bowen LJ. Compare the distinction between rules in restraint of trade and rules (now obsolete) regulating trade. As to a restriction as to name see *Vernon v Hallam* (1886) 34 ChD 748 (covenant not to carry on the business of a manufacturer anywhere for five years under a particular name is not a general restraint or void); *Wolmershausen v O'Connor* (1877) 36 LT 921 (covenant not to hold out as formerly connected in trade with another is not in general restraint or void).

16 *Wallis v Day* (1837) 2 M & W 273, where a covenant by the vendor of a carrier's business, in consideration of weekly payments, never to trade as a carrier except as the servant of the covenantee was held good.

17 *Clerke v Comer* (1734) Lee temp Hard 53; *Hitchcock v Coker* (1837) 6 Ad & El 438, Ex Ch; *Archer v Marsh* (1837) 6 Ad & El 959; *Elves v Crofts* (1850) 10 CB 241; *Tallis v Tallis* (1853) 1 E & B 391; *Catt v Tourle* (1869) 4 Ch App 654; *Davies v Davies* (1887) 36 ChD 359 at 390, CA, per Bowen LJ.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(ii) Scope of the Restraint of Trade Doctrine/387. Repudiation of distinction between general and partial restraint.

### 387. Repudiation of distinction between general and partial restraint.

The doctrine that there was an essential distinction between a general and a partial restraint of trade was in time repudiated<sup>1</sup>, and the rule now is clear that restraints, whether general or partial, may be good if they are reasonable<sup>2</sup>. Any restriction upon freedom of contract to which the restraint of trade doctrine applies must be shown to be reasonably necessary for the purpose of freedom of trade<sup>3</sup>.

1 In *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, HL, a doubt was expressed (see at 557 per Lord Ashbourne, and at 562 per Lord Macnaghten) whether it had ever existed at any time. A similar doubt had been expressed in *Rousillon v Rousillon* (1880) 14 ChD 351 at 366-369; cf *Horner v Graves* (1831) 7 Bing 735; *Whittaker v Howe* (1841) 3 Beav 383, where a restraint extending over Great Britain was held good; *Jones v Lees* (1856) 1 H & N 189, where a covenant by a licensee of a patent, with no limit of space, was held good; *Harms v Parsons* (1862) as reported in 32 LJ Ch 247, where Romilly MR quoted *Whittaker v Howe*, without disapproval; *Leather Cloth Co v Lorsche* (1869) LR 9 Eq 345, where a restraint extending over Europe was held good, but the decision apparently was to be explained as a case of a trade secret (cf *Allsopp v Wheatcroft* (1872) LR 15 Eq 59 at 64 per Wickens V-C); *Harvey v Corpe* (1885) 79 LT Jo 246, where a restraint covering Europe was held reasonable in the case of an army meat contractor; *Davies v Davies* (1887) 36 ChD

359 at 398, CA, per Fry LJ. The contrary view was expressed in *Mallan v May* (1843) 11 M & W 653; *Nicholls v Stretton* (1847) 10 QB 346 at 353 per Patteson J; *Tallis v Tallis* (1853) 1 E & B 391; cf *Vernon v Hallam* (1886) 34 ChD 748 at 751, citing *Homer v Ashford and Ainsworth* (1825) 3 Bing 322 at 326 per Best J; *Davies v Davies* (1887) 36 ChD 359 at 382, 385-386, 398; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 546, HL, per Lord Herschell LC. For dicta on the question since *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* see *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA; *Dowden and Pook Ltd v Pook* [1904] 1 KB 45 at 51, CA; *Beetham v Fraser* (1904) 21 TLR 8, DC; *Russell v Amalgamated Society of Carpenters and Joiners* [1910] 1 KB 506 at 520, CA (affd [1912] AC 421, HL); *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912) as reported in 107 LT 439 at 445, CA, per Farwell LJ; *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, PC.

2 The restraint must be reasonable in the interests of the public, the covenantee and the covenantor. For separate consideration of these aspects of reasonableness see PARAS 389, 412. For the general principle see *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 548, HL, per Lord Herschell LC; *Dubowski & Sons v Goldstein* [1896] 1 QB 478 at 484, CA; *Trego v Hunt* [1896] AC 7 at 27, HL; *Stride v Martin* (1897) 77 LT 600, DC; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 at 455, CA; *Haynes v Doman* [1899] 2 Ch 13 at 17, CA; *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169; *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 304, CA; *Marshall's Ltd v Leek* (1900) 17 TLR 26; *Dowden and Pook Ltd v Pook* [1904] 1 KB 45 at 52-53, 55, CA; *Tivoli, Manchester, Ltd v Colley* (1904) 20 TLR 437; *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, CA; *Beetham v Fraser* (1904) 21 TLR 8, DC; *Hooper and Ashby v Willis* (1906) 94 LT 624, CA; *Mouchel v Cubitt & Co* (1907) 24 RPC 194; *Lewis and Lewis v Durnford* (1907) 24 TLR 64; *White, Tomkins and Courage v Wilson* (1907) 23 TLR 469; *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330, PC, explaining and distinguishing *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, HL; *Bromley v Smith* [1909] 2 KB 235; *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 766, CA; *Russell v Amalgamated Society of Carpenters and Joiners* [1910] 1 KB 506 at 521, CA (affd [1912] AC 421, HL); *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912) as reported in 107 LT 439 at 445, CA, per Farwell LJ; *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781, PC; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 733, HL; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 700, 707, HL; *Attwood v Lamont* [1920] 3 KB 571 at 584, CA; *Connors Bros Ltd v Connors* [1940] 4 All ER 179, PC; and the cases cited in PARA 390 note 1.

3 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 at 465 per Jessel MR; *Rousillon v Rousillon* (1880) 14 ChD 351 at 365. A restraint reasonably necessary for the protection of the covenantee must prevail unless some specific ground of public policy can be clearly established against it: *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA. As to what may constitute such ground of public policy see *Russell v Amalgamated Society of Carpenters and Joiners* [1912] AC 421, HL, where the area from which employers, not parties to the agreement, could obtain workmen was unreasonably restricted. For an instance of an unlawful monopoly see *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912) as reported in 107 LT 439, CA; revsd [1914] AC 461, HL, on a point of pleading; see also PARA 361.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(ii) Scope of the Restraint of Trade Doctrine/388. Agreements subject to the restraint of trade doctrine.

### **388. Agreements subject to the restraint of trade doctrine.**

The restraint of trade doctrine is capable of application to agreements made:

- (1) between vendors and purchasers of businesses;
- (2) between partners;
- (3) between employers and employees<sup>1</sup>;
- (4) between independent traders or groups of traders with a view to eliminating or reducing competition, regulating output and the like;
- (5) between employers with a view to united action in relation to those whom they employ; and
- (6) between employees with a view to united action in relation to their employers<sup>2</sup>.

However, this is not an exhaustive list of the scope of application of the doctrine: the categories of agreements in restraint of trade are not closed<sup>3</sup>. It may be that contracts of a kind that have gained a general commercial acceptance are not subject to the restraint of trade doctrine<sup>4</sup>, whereas the fact that there is inequality of bargaining power between the parties to an agreement may be a factor in determining whether the doctrine is applicable<sup>5</sup>, as may the fact that a covenantee has a conflict of interest which may be detrimental to the position of the covenantor<sup>6</sup>. A professional or other body which controls particular activities may be found to be acting in restraint of trade in certain circumstances<sup>7</sup>. However, where a body invested with statutory powers exercises those powers lawfully and not unreasonably, its decisions cannot be challenged under the restraint of trade doctrine<sup>8</sup>.

There is a public policy in favour of the settlement of disputes in litigation; in consequence of this, the court will not allow a genuine and proper compromise of earlier litigation alleging restraint of trade itself to be challenged as being in restraint of trade<sup>9</sup>.

1 With regard to these first three classes of agreements, although occasional distinctions are to be noted (the law taking a stricter view of the third class: see PARA 390 et seq), the same general rules apply, and there is no sufficient reason for treating them as distinct categories. The principles applying as between a vendor and purchaser of a business are also applicable to the sale of stocks or shares in a company by a vendor who enters into restrictive covenants with the purchaser (see *Connors Bros Ltd v Connors* [1940] 4 All ER 179 at 191, PC), and those applying as between employer and employee are applicable to an agreement between two employers where each agrees not to employ persons previously employed by the other (*Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108, [1958] 2 All ER 65, CA; see also *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, [1963] 3 All ER 139). As to restraints as between employers and employees see also **EMPLOYMENT** vol 39 (2009) PARAS 19-20. As to restraints imposed by vendors and lessors of land and houses see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARAS 513-521, 526-529; **SALE OF LAND** vol 42 (Reissue) PARAS 331-335. The doctrine of restraint of trade is not confined to restraints on persons but applies also to restraints on the use of land, including restraints imposed by covenants in mortgages: *Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL. Restrictions on the user of a particular house or piece of land imposed on a lease or sale do not, however, normally fall within the doctrine in so far as they do not restrict a pre-existing freedom of the lessee or purchaser to trade there (*Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*; see also *Cleveland Petroleum Co Ltd v Dartstone Ltd* [1969] 1 All ER 201, [1969] 1 WLR 116, CA (where a solus agreement in a lease was held to be valid)), but the decisions on the subject are relevant on the questions of the meaning of 'trade' and the acts which constitute breach of covenant (see *Taff Vale Rly Co (Directors etc) v Macnabb* (1873) LR 6 HL 169 (agreement on lease of a dock); *Gloucester City Council v Williams* (1990) 88 LGR 853, CA; *Robinson v Golden Chips (Wholesale) Ltd* [1971] NZLR 257, NZ CA; *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 8 ALR 555, Aust HC). The court will strike down a 'sham' transaction, however: *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] AC 561, [1975] 1 All ER 968, PC. As to the treatment of 'land agreements' under the Competition Act 1998 see PARAS 142, 143.

2 As to these last two classes of agreements see **EMPLOYMENT** vol 40 (2009) PARA 846 et seq.

3 See *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146 at 169, [1966] 1 All ER 126 at 131, CA, per Lord Denning MR; *Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 337, [1967] 1 All ER 699 at 732, HL, per Lord Wilberforce.

4 See *Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 332-333, [1967] 1 All ER 699 at 729-730, HL, per Lord Wilberforce, and at 328 and 727 per Lord Pearce.

5 See *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL. However, it is not a prerequisite that any such element be present: *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 233.

6 *Watson v Prager* [1991] 3 All ER 487 at 505-506, [1991] 1 WLR 726 at 747.

7 See PARA 377 note 7.

8 *R v General Medical Council, ex p Colman* [1990] 1 All ER 489 at 508-509, CA, per Ralph Gibson LJ, and at 510 per Lord Donaldson of Lynton MR.

9 *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 233, following *Binder v Alachouzos* [1972] 2 QB 151, [1972] 2 All ER 189, CA, and *Colchester Borough Council v Smith* [1992] Ch 421, [1992] 2 All ER 561, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iii) Legitimate Interests of a Covenantor that Merit Protection/389. Restraint must be to protect a legitimate interest.

### (iii) Legitimate Interests of a Covenantor that Merit Protection

#### 389. Restraint must be to protect a legitimate interest.

A restraint of trade will be contrary to public policy unless it is imposed to protect a legitimate interest of the covenantor; there cannot be a restraint of trade in gross<sup>1</sup>. The restraint must be, for example, for the protection of a business in which the covenantor is interested. Thus, a purchaser of a business is entitled to protect himself against competition per se on the part of the vendor<sup>2</sup>. However, a company controlling, controlled by or interested in another company, or in which another company has an interest, cannot impose on an employee an area of restraint which is wider than is necessary for the protection of its own business in an attempt to protect the business of such other company<sup>3</sup>. In an agreement for the sale of a business the reasonableness of a vendor's restrictive covenant is to be judged by the extent and circumstances of the business sold and not by those of any business of the purchaser of which, after transfer, the business sold is to form a part<sup>4</sup>.

An employer is not entitled to protect himself against competition per se on the part of an employee after the employment has ceased<sup>5</sup>.

Where the true skills and art of a job lie in the make-up of the person performing it, such as his personality, temperament and ability to get on with people, there is no proprietary right which an employer can claim to protect for himself as part of his business<sup>6</sup>.

1 *Mitchel v Reynolds* (1711) 1 P Wms 181 at 190, where it was said that 'It would be unreasonable to fix a certain loss on one side without any benefit to the other'; *Horner v Graves* (1831) 7 Bing 735 at 743; *Townsend v Jarman* [1900] 2 Ch 698 at 702 per Farwell J; *Henry Leatham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322 at 326, CA; *British Reinforced Concrete Engineering Co Ltd v Schelff* [1921] 2 Ch 563; *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, PC. The covenantor must be interested in the business at the date of entering into the agreement: *Great Western and Metropolitan Dairies Ltd v Gibbs* (1918) 34 TLR 344. Apparently a covenant may be valid even though entered into by an employee as part of the consideration for his release from his contract of service: *Spink (Bournemouth) Ltd v Spink* [1936] Ch 544, [1936] 1 All ER 597. It appears that a mere sentimental interest on the part of the covenantor will not justify a restraint, and the only suggestion in the cases that this is possible is in *Kimberley v Jennings* (1836) 6 Sim 340 at 351 per Shadwell V-C; but see *Upton v Henderson* (1912) 106 LT 839; and PARA 377 note 3. As to what may constitute an interest in a business see *Everton v Longmore* (1899) 15 TLR 356, CA, where a body of the nature of a friendly society was held entitled to enforce a covenant by a doctor; *Ballachulish Slate Quarries Ltd v Grant* (1903) 5 F 1105, Ct of Sess, where a quarry company engaging a doctor to attend its employees with liberty to take other practice was held entitled to enforce a covenant against his practising in the district on the termination of his employment; cf *Mineral Water Bottle Exchange and Trade Protection Society v Booth* (1887) 36 ChD 465 at 469, CA. For examples of other interests which have been recognised see *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, [1963] 3 All ER 139; *Greig v Insole* [1978] 3 All ER 449, [1978] 1 WLR 302; *Dawnay, Day & Co Ltd v De Braconier d'Alphen* [1998] ICR 1068, [1997] IRLR 442, CA.

2 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 709, HL, per Lord Parker of Waddington; *Attwood v Lamont* [1920] 3 KB 571 at 589, CA, per Younger LJ. The restraint must be confined to the area within which competition will in all probability enure to the injury of the purchaser: *Herbert Morris Ltd v Saxelby* at 709 per Lord Parker of Waddington. See also *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 548, HL, per Lord Herschell LC; *Southland Frozen Meat and Produce Export Co Ltd v Nelson Bros Ltd* [1898] AC 442, PC (agreement on purchase of the output of a business for a limited period). The same principles apply where a retiring partner sells his share: *Williams v Williams* (1818) 2 Swan 253; see **PARTNERSHIP** vol 79 (2008) PARA 213 et seq.

3 *Henry Leatham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322, CA; see also *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 at 310. But see *Stenhouse Australia Ltd v Phillips* [1974] AC 391, [1974] 1 All ER 117, PC, where a company's business was to some extent transacted for it by subsidiaries as its agencies or instrumentalities and a covenant which protected the business so transacted was held reasonable. See also *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] ICR 1539 (company and subsidiaries viewed as one concern directed by company so that covenant not defeated by fact company's business transacted by subsidiaries).

4 *British Reinforced Concrete Engineering Co Ltd v Schelff* [1921] 2 Ch 563, not following *Smedley's Ltd v Smedley* [1921] 2 Ch 580n. See also *Goldsoll v Goldman* [1915] 1 Ch 292, CA; *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, PC.

5 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, HL, applied in *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108, [1958] 2 All ER 65, CA, where an agreement between two employers by which each agreed not to employ persons employed by the other within the previous five years was held invalid. An employer has no legitimate interest in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that he is a competitor: *Attwood v Lamont* [1920] 3 KB 571 at 589, CA, per Younger LJ; *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* at 126 and at 74 per Jenkins LJ, followed in *Kerchiss v Colora Printing Inks Ltd* [1960] RPC 235, where the particular agreement was held valid. See also *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763, CA; *Ropeways Ltd v Hoyle* (1919) 88 LJCh 446; *Bowler v Lovegrove* [1921] 1 Ch 642 at 650 per PO Lawrence J; and see *Vandervell Products Ltd v McLeod* [1957] RPC 185, CA; *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 431, [1963] 3 All ER 139 at 148; *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA; *Gledhow Autoparts Ltd v Delaney* [1965] 3 All ER 288, [1965] 1 WLR 1366, CA, where a restraint on dealing with all garages in the area, not merely those called on by the salesman during his employment, was held unreasonable; *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 (proviso purporting to remove entitlement to post-termination commission if employee continued to work in insurance industry was held unreasonable); *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214, CA; *Wincanton Ltd v Cranny* [2000] IRLR 716, CA.

6 *Cantor Fitzgerald (UK) Ltd v Wallace* [1992] IRLR 215.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/A. IN GENERAL/390. Function of the court.

#### **(iv) Reasonableness between the Parties**

##### **A. IN GENERAL**

##### **390. Function of the court.**

It is for the court to decide, as a matter of law, whether a contract in restraint of trade is reasonable<sup>1</sup>. This entails a consideration of the reasonableness of the restraints between the parties<sup>2</sup> and in the public interest<sup>3</sup>. Any disputed questions as to the nature of the business, as to what is customary in it, as to the number and situation of its customers, as to any particular dangers requiring precautions and the like are questions of fact, and all these matters are relevant to the question of reasonableness<sup>4</sup>.

1 *Mitchel v Reynolds* (1711) 1 P Wms 181 at 195; *Chesman v Nainby* (1727) 2 Stra 739 (affd 1 Bro Parl Cas 234, HL); *Davis v Mason* (1793) 5 Term Rep 118; *Horner v Graves* (1831) 7 Bing 735; *Proctor v Sargent* (1840) 2 Man & G 20; *Mallan v May* (1843) 11 M & W 653; *Tallis v Tallis* (1853) 1 E & B 391; *Dowden and Pook Ltd v Pook* [1904] 1 KB 45, CA; *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363 at 368, CA; *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 770, CA, per Fletcher Moulton LJ, and at 772 per Farwell LJ; *Russell v Amalgamated Society of Carpenters and Joiners* [1910] 1 KB 506 at 522, CA (affd, but without reference to this point, [1912] AC 421, HL); *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* (1912) as reported in 107 LT 439 at 445, CA, per Farwell LJ. As to the admissibility of evidence of contracts between the covenantor and other persons see *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* at 440; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 797, PC; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL;



*Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 707, HL, per Lord Parker of Waddington. A court must first determine the extent of any restraint before it can form a view as to whether the restraint is valid: *Società Esplosivi Industriali SpA v Ordnance Technologies (UK) Ltd (formerly SEI (UK) Ltd)* [2004] EWHC 48 (Ch), [2004] 1 All ER (Comm) 619.

2 As to reasonableness between the parties regarding the character of the business to be protected, the extent of area of operation of the covenant, its duration, customers and name and confidential matters see PARAS 391-411.

3 As to reasonableness in the public interest see PARA 412.

4 *Mumford v Gething* (1859) 7 CBNS 305; *Haynes v Doman* [1899] 2 Ch 13 at 24, CA; *Dowden and Pook Ltd v Pook* [1904] 1 KB 45 at 52, 54, CA; *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, CA; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL. It is also a question of fact whether a business alleged to be carried on by the covenantor is his business (*Clark v Howard* (1860) 2 F & F 125), but whether there has been a breach is a question of law (*Kemp v Sober* (1851) 1 Sim NS 517 (affd (1852) 19 LTOS 308); *Turner v Evans* (1852) 2 De GM & G 740; *Wickenden v Webster* (1856) 6 E & B 387). It has been said that the number of inhabitants in the area of restriction is irrelevant: *Mallan v May* (1843) 11 M & W 653 at 667 per Parke B; but cf *Hitchcock v Coker* (1837) 6 Ad & El 438 at 454, Ex Ch, per Tindal CJ; *Proctor v Sargent* (1840) as reported in 10 LJCP 34 at 36 per Maule J and Tindal CJ, and at 39 per Bosanquet J, referring, however, to proceedings on demurrer and the impossibility of the court taking judicial notice of the population of a district without evidence.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/A. IN GENERAL/391. Test to be applied.

### 391. Test to be applied.

In estimating the reasonableness of an agreement in restraint of trade, extravagant possibilities should not be taken into account<sup>1</sup>. Evidence as to the mode in which the agreement has been carried out may not be relevant to the question of its construction<sup>2</sup>, nor is evidence that the covenantee or other persons think it reasonably necessary<sup>3</sup>. That it is unusual is evidence to show that it is unreasonable<sup>4</sup>, and, conversely, that it is customary is evidence that it is reasonable<sup>5</sup>.

1 *Rannie v Irvine* (1844) 7 Man & G 969, where it was held that if the restraint is on trading as a baker with a limited number of customers, it is not necessary to consider the possibility of one of them going to a village where the covenantor is the only baker; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 574, HL, per Lord Macnaghten; *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 306, CA, per Lindley MR; *Haynes v Doman* [1899] 2 Ch 13 at 26, CA, per Lindley MR, where it was held that if the covenant is intended to prevent an employee from betraying business methods, it is not necessary to consider the possibility of his leaving his employment so soon as to have acquired no knowledge of those methods. See also *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA; *Home Counties Dairies Ltd v Skilton* [1970] 1 All ER 1227, [1970] 1 WLR 526, CA. As to construction of the contract generally see PARA 420 et seq.

2 *Elves v Crofts* (1850) 10 CB 241; *Jacoby v Whitmore* (1883) 49 LT 335 at 337, CA, per Brett MR; *Perls v Saalfeld* [1892] 2 Ch 149 at 151, 153, CA; *Russell v Amalgamated Society of Carpenters and Joiners* [1910] 1 KB 506 at 522, CA (affd, but without reference to this point, [1912] AC 421, HL); *Lovell and Christmas Ltd v Wall* (1911) 27 TLR 236, CA.

3 *Haynes v Doman* [1899] 2 Ch 13 at 24, CA; *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 772, CA; *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413 at 438, [1963] 3 All ER 139 at 150.

4 *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 767, 770, CA, where the restraint imposed on a newspaper reporter from ever being connected with any other newspaper within 20 miles (and where no instance was proved of a similar restriction in the trade) was held unreasonable. For cases where the covenant was held unreasonable in itself and the covenantor was a minor at the date of the agreement see *Pearks Ltd v Cullen* (1912) 28 TLR 371; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 732, HL.

5 *Catt v Tourle* (1869) 4 Ch App 654 at 659; *Cornwall v Hawkins* (1872) 41 LJCh 435 at 436; *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 770, CA, per Fletcher Moulton LJ.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/A. IN GENERAL/392. Time for determining reasonableness.

### 392. Time for determining reasonableness.

If a covenant was reasonable when made, subsequent events do not affect its validity<sup>1</sup>. The court ascertains what was the intention of the parties from the whole agreement and the circumstances at the time at which it was entered into<sup>2</sup>.

1 *Elves v Crofts* (1850) 10 CB 241; *Jacoby v Whitmore* (1883) 49 LT 335 at 337-338, CA; *Townsend v Jarman* [1900] 2 Ch 698 at 703; *Dowden and Pook Ltd v Pook* [1904] 1 KB 45 at 55, CA, per Cozens-Hardy LJ; *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363 at 367, CA, per Vaughan Williams LJ; *Bridge v Deacons* [1984] AC 705 at 718, sub nom *Deacons v Bridge* [1984] 2 All ER 19 at 25, PC; *Clarke v Newland* [1991] 1 All ER 397, CA, per Neill LJ at 402. Cf *Keppell v Bailey* (1834) 2 My & K 517 at 530; *Kimberley v Jennings* (1836) 6 Sim 340 at 350; *Jones v Lees* (1856) 1 H & N 189. But in *Shell UK Ltd v Lostock Garage Ltd* [1977] 1 All ER 481, [1976] 1 WLR 1187, CA, the court declined to enforce a valid solus agreement in circumstances in which it had become unfair and prejudicial to the covenantor. See also *Passmore v Moreland* [1999] 3 All ER 1005, [1999] 1 CMLR 1129, CA, in which the Court of Appeal held that an agreement may be void at one time under the EC Treaty art 81 but become valid where circumstances change and vice versa; the court, at 519-520, commented on the judgment in *Shell UK Ltd v Lostock Garage Ltd*. As to the EC Treaty (ie the Treaty establishing the European Community (Rome, 25 March 1957; TS 1 (1973); Cmd 5179)) see PARA 24 note 1. The numbering for the EC Treaty used in this title is as revised by the Treaty of Amsterdam: see PARA 24 note 1.

2 *Keppell v Bailey* (1834) 2 My & K 517 at 530; *Kimberley v Jennings* (1836) 6 Sim 340 at 350; *Mumford v Gething* (1859) 7 CBNS 305; *Clarkson v Edge* (1863) 33 Beav 227; *Taff Vale Rly Co (Directors etc) v Macnabb* (1873) LR 6 HL 169 at 179 per Lord Colonsay; *Palmer v Mallet* (1887) 36 ChD 411, CA, where the words 'set up or carry on the profession or business of a surgeon' in the recital of a bond were construed in the light of words 'as assistant of any other person' in the defeasance clause; but, apparently, apart from this, acting as assistant to a surgeon is 'carrying on the profession' (see PARA 428). But an absolute covenant in a bond will not be qualified by a recital, in the absence of an application to rectify: see *Bird v Lake* (1863) 1 Hem & M 338 at 341 per Page Wood V-C ('Covenants of this kind are sometimes held to be restricted by the recitals in the deed, but I never knew of a case in which such a covenant was enlarged by the recital'); *Mills v Dunham* [1891] 1 Ch 576, CA; *Perls v Saalfeld* [1892] 2 Ch 149 at 154, CA; *Moenich v Fenestre* (1892) 61 LJCh 737 at 740, CA, per Lindley LJ; *Rogers v Maddocks* [1892] 3 Ch 346 at 354, 356, CA; *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447 at 452; *Dubowski & Sons v Goldstein* [1896] 1 QB 478, CA; *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169; *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA; *Marshalls Ltd v Leek* (1900) 17 TLR 26; *Henry Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322, CA, where a contract with the agent for a number of interdependent companies was construed as a separate contract with the company in whose service the covenantor acted; and, apparently, would have been a separate contract with any company to whose service he might have been transferred; *Cavendish v Tarry* (1908) 52 Sol Jo 726; *Coleborne v Kearns* (1912) 46 ILT 305, CA, where the words 'leave employment' were held not to cover dismissal; cf *Cave v Horsell* [1912] 3 KB 533, CA (meaning of 'adjoining'). See also *Hadsley v Dayer-Smith* [1914] AC 979 at 983, HL, per Lord Shaw of Dunfermline; *Gledhow Autoparts Ltd v Delaney* [1965] 3 All ER 288, [1965] 1 WLR 1366, CA; *Home Counties Dairies Ltd v Skilton* [1970] 1 All ER 1227, [1970] 1 WLR 526, CA; *Marion White Ltd v Francis* [1972] 3 All ER 857, [1972] 1 WLR 1423, CA. Other agreements existing between the covenantor and other persons may be considered with reference to the question of reasonableness and public interest: *North-Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1913] 3 KB 422, CA; revsd on other grounds [1914] AC 461, HL.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/A. IN GENERAL/393. Consideration of agreement as a whole.

### 393. Consideration of agreement as a whole.

It is the covenant in restraint of trade as a whole which must be considered, not the particular breach complained of, and the court will not decide on the reasonableness of the covenantor's conduct in each particular case as it arises<sup>1</sup>. Where, however, the covenant includes trades or places or persons, and in respect of some of them it is reasonable while in respect of others it is not, the part which is reasonable, if it can be severed from the rest, will be enforced in the event of a breach of that part<sup>2</sup>.

1 *Davies v Davies* (1887) 36 ChD 359 at 387, CA, per Cotton LJ; *Baker v Hedgecock* (1888) 39 ChD 520. In *Tallis v Tallis* (1853) 1 E & B 391 at 412, Lord Campbell CJ said 'We have limited our judgment to the parts of the contract to which these breaches relate, because, if these are valid, the invalidity of other parts of the contract is immaterial'; but this, apparently, must be taken in relation to the rules as to severability: see PARAS 433-434.

2 *Chesman v Nainby* (1727) 1 Bro Parl Cas 234, HL; *Mallan v May* (1843) 11 M & W 653; *Price v Green* (1847) 16 M & W 346, Ex Ch; *Baines v Geary* (1887) 35 ChD 154; *Hooper and Ashby v Willis* (1905) 21 TLR 691 at 692 per Kekewich J (affd (1906) 22 TLR 451, CA); *Lievre v Mayonnet* (1913) 2 LJCCR 4. As to severability see PARAS 433-434.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/A. IN GENERAL/394. Difference between employment and sale of business.

### 394. Difference between employment and sale of business.

The court takes a stricter and less favourable view of covenants entered into between employer and employee than it does of similar covenants between vendor and purchaser<sup>1</sup>, or in partnership agreements, and accordingly a restraint may be unreasonable as between employer and employee which would be reasonable as between the vendor and purchaser of a business<sup>2</sup>.

1 *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266 at 270, [1954] 1 WLR 815 at 820, CA, per Jenkins LJ (partnership agreement). This statement was made in reference to possible differences in the law as to severance: see PARAS 433-434. For a borderline case where the relationship between the parties was held analogous to that of employer and employee see *Jenkins v Reid* [1948] 1 All ER 471 (medical practice; plaintiff not a party to deed of partnership between her husband and defendant); for borderline cases where the relationship between the parties was considered to be analogous to a vendor and purchaser relationship see *Prontaprint plc v London Litho Ltd* [1987] FSR 315 (franchise agreement); *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] IRLR 60 (covenant between former self-employed sales associate and company); *Systems Reliability Holdings plc v Smith* [1990] IRLR 377 (covenant between employer and employee on latter's purchase of shares in employer); *Kall-Kwik Printing (UK) Ltd v Rush* [1996] FSR 114 (franchise agreement); *Alliance Paper Group plc v Prestwich* [1996] IRLR 25 (sale of shares by vendor who then entered into a contract of services with the purchasing company).

2 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 566, HL, per Lord Macnaghten; *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 305, CA, and see at 310 per Vaughan Williams LJ (dissenting, but not on this point); *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 738, HL, per Lord Shaw of Dunfermline; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 701, HL, per Lord Atkinson, and at 709 per Lord Parker of Waddington; *Great Western and Metropolitan Dairies Ltd v Gibbs* (1918) 34 TLR 344; *Attwood v Lamont* [1920] 3 KB 571, CA. Cf *North-Western Salt Co v Electrolytic Alkali Co Ltd* [1914] AC 461 at 470, HL, per Lord Haldane LC; *English Hop Growers Ltd v Dering* [1928] 2 KB 174 at 180, CA, per Scrutton LJ; *M*

*& S Drapers (a firm) v Reynolds* [1956] 3 All ER 814 at 820-821, [1957] 1 WLR 9 at 18-19, CA, per Denning LJ; see also *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] IRLR 60 at 63-64; *Systems Reliability Holdings plc v Smith* [1990] IRLR 377 at 382.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/A. IN GENERAL/395. Commercial agents.

### **395. Commercial agents.**

In agreements between a principal and a commercial agent<sup>1</sup> to which the Commercial Agents (Council Directive) Regulations 1993 apply<sup>2</sup> a restraint of trade clause is valid only if and to the extent that:

- (1) it is concluded in writing; and
- (2) it relates to the geographical area of the group of customers and the geographical area entrusted to the commercial agent and to the kind of goods covered by his agency under the contract<sup>3</sup>.

A restraint of trade clause in these circumstances is valid for not more than two years after termination of the agency contract<sup>4</sup>.

1 'Commercial agent' means a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the 'principal'), or to negotiate and conclude a sale or purchase of goods on behalf of and in the name of that principal: Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 2(1). Certain positions with similar characteristics to those set out in that definition are specifically excluded from it: see reg 2(1)(i)-(iii).

2 The regulations apply in relation to the activities of commercial agents in Great Britain, except where the parties have agreed that the agency contract is governed by the law of another member state of the European Union: see the Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 1(2)-(3) (reg 1(3) substituted by SI 1998/2868). 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a).

3 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 20(1).

4 Commercial Agents (Council Directive) Regulations 1993, SI 1993/3053, reg 20(2).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/B. CHARACTER OF THE BUSINESS TO BE PROTECTED/396. The business from which the covenantor is restrained.

### **B. CHARACTER OF THE BUSINESS TO BE PROTECTED**

#### **396. The business from which the covenantor is restrained.**

A restraint otherwise unobjectionable may be unreasonably wide if it restrains the covenantor from carrying on any business whatsoever<sup>1</sup>, or a business different in character from that carried on by the covenantee<sup>2</sup>, or a business of a like character to that carried on by the

covenantee but subsequently set up in a different place<sup>3</sup>, or a business which, although carried on by the covenantee, is not the business in which the covenantor was employed<sup>4</sup>, or a business not carried on by the covenantee in a place to which the restraint purports to extend<sup>5</sup>. The reasonableness of the restraint is to be judged with reference to the extent of the business sold and not with reference to the business of the purchaser<sup>6</sup>.

1 *Baker v Hedgecock* (1888) 39 ChD 520; *Perls v Saalfeld* [1892] 2 Ch 149, CA, where a covenant by a clerk to an oil importer and agent not to take a situation or establish himself within 15 miles of London for three years without the consent of the covenantee, such consent not to be withheld if it were proved to the covenantee's satisfaction that the situation or business was not in respect of the class of goods sold by the covenantee, was held void. As to provisos against withholding consent see PARA 421 note 3; *Woods v Thorburn* (1897) 41 Sol Jo 756 ('any other business': too wide); *Ehrman v Bartholomew* [1898] 1 Ch 671 ('any other business': too wide); cf *Reeve v Marsh* (1906) 23 TLR 24 at 25 per Parker J; *Morris & Co v Ryle* (1910) 103 LT 545, CA, where a restraint on a hop merchant's salesman from any dealing in any goods whatever with persons whom he had dealt with during his employment was held unreasonable; *JA Mont (UK) Ltd v Mills* [1993] IRLR 172, CA ('another company in the tissue industry': too wide); *Wincanton Ltd v Cranny* [2000] IRLR 716, CA (restraint prohibiting involvement in any capacity in any business of whatever kind which was wholly or partly in competition with any business carried on by the company was held too wide to be enforceable).

2 *Rogers v Maddocks* [1892] 3 Ch 346 at 355, CA, per Lindley LJ, where it was held that the selling of an article wholesale and retail did not constitute two distinct businesses, but one business carried on in different ways, and although a salesman has during his employment only dealt with wholesale agents, a covenant to restrain him from both wholesale and retail trade may be reasonable; *Bromley v Smith* [1909] 2 KB 235, where a covenant by a baker's employee not to carry on the business of a restaurant keeper was held unreasonable although the covenantee, at the time of the covenant, contemplated the keeping of a restaurant, but it was suggested, at 241 per Channell J, that if the covenantor's engagement had been for the contemplated as well as for the existing business, the restraint might have been reasonable; *Goldsoll v Goldman* [1915] 1 Ch 292, CA, where a covenant entered into on the sale of a business dealing in imitation jewellery not to be concerned in the business of dealing in real or imitation jewellery was held too wide; *Routh v Jones* [1947] 1 All ER 758, CA, where covenants by a doctor's assistant not to practise or cause or assist any other person to practise in any department of medicine, surgery or midwifery and not to accept or give any professional appointment were both held to be unreasonably wide (followed in *Jenkins v Reid* [1948] 1 All ER 471 and in *Lyne-Pirkis v Jones* [1969] 3 All ER 738, [1969] 1 WLR 1293, CA, where a covenant by a partner in a general medical practice was held to preclude practice as a consultant and was therefore too wide; see *Peyton v Mindham* [1971] 3 All ER 1215, [1972] 1 WLR 8). See *British Reinforced Concrete Engineering Co Ltd v Schelff* [1921] 2 Ch 563; *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793, CA; cf *Beetham v Fraser* (1904) 21 TLR 8, DC.

3 *Davies, Turner & Co v Lowen* (1891) 64 LT 655, where a covenant as to any business similar to the business 'now or hereafter to be carried on' by the covenantee was held unreasonable, but severable; *Dubowski & Sons v Goldstein* [1896] 1 QB 478, CA; *Beetham v Fraser* (1904) 21 TLR 8, DC, where it was admitted that a restraint from competition with the business of the covenantee at any addresses in the future was void; cf *Chesman v Nainby* (1727) 1 Bro Parl Cas 234, HL, where the restraint was within half a mile (1) of the covenantee's house, or (2) of any house to which he should remove; and the validity of head (2) was not expressly decided upon, but its presence did not invalidate the whole; *Berlitz School of Languages v Duchêne* (1903) 6 F 181, Ct of Sess. The restraint must cover only such businesses as are carried on by the covenantee at the time of the agreement, and the covenant will not be saved by the covenantee subsequently acquiring businesses within the restraint: *Great Western and Metropolitan Dairies Ltd v Gibbs* (1918) 34 TLR 344.

4 *Henry Leatham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322 at 327, CA, per Farwell LJ. But in *Stewart v Stewart* (1899) 1 F 1158, Ct of Sess, it was held in Scotland that a restraint from carrying on a business by a person not employed in it was good.

5 *Davies, Turner & Co v Lowen* (1891) 64 LT 655 (carrier's clerk; time, 12 months; area, London, Birmingham, Liverpool and New York, and within 50 miles of each; Birmingham held void, as covenantees had no business there, but severable); *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 at 310 (traveller for tyre company; time, one year; area, United Kingdom, Germany, France; Germany and France void for the like reason, but severable); *SV Nevanas & Co Ltd v Walker and Foreman* [1914] 1 Ch 413 (manager of company importing meat in Australian trade; covenant covering American trade also; void); *Goldsoll v Goldman* [1915] 1 Ch 292, CA (sale of business in imitation jewellery carried on in London; area, London, United Kingdom, Isle of Man, France, the United States, Russia, Spain etc; void but severable); *Spence v Mercantile Bank of India Ltd* (1921) 37 TLR 390 (on appeal 37 TLR 745, CA) (covenant by clerk of bank doing business in certain but not all eastern countries not to enter service of any eastern bank; void); *Greer v Sketchley Ltd* [1979] FSR 197, CA (covenant by director of dry cleaning business carried on in certain parts only of England and Wales; area, United Kingdom; too wide).

6 *British Reinforced Concrete Engineering Co Ltd v Schelfff* [1921] 2 Ch 563 (sale of small business in road reinforcements to purchasers carrying on large similar business; area, United Kingdom; void).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/B. CHARACTER OF THE BUSINESS TO BE PROTECTED/397. Change of locality.

### 397. Change of locality.

A business, although of the same character, is a different business if it is subsequently set up in a wholly different locality<sup>1</sup>, but not if the business is merely removed to another place in the same neighbourhood<sup>2</sup>.

1 *Dubowski & Sons v Goldstein* [1896] 1 QB 478, CA; *Doe d Calvert v Reid* (1830) 10 B & C 849. As to the position in relation to covenants in brewers leases see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 546 et seq.

2 *Jacoby v Whitmore* (1883) 49 LT 335, CA. In *Marshall and Murray Ltd v Jones* (1913) 29 TLR 351, the restraint was specifically limited to customers served by and from a named dairy, and it was held that this could not be taken to refer to the same business set up in a different place.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/B. CHARACTER OF THE BUSINESS TO BE PROTECTED/398. Status and occupation of covenantor.

### 398. Status and occupation of covenantor.

The position of the covenantor in the business may be a matter for consideration, as the danger of competition in the case, for instance, of a manager may be greater than in the case of a clerk<sup>1</sup>. Regard must also be had to the nature of the occupation for which the covenantor is employed<sup>2</sup>.

1 Cf *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363 at 368, CA, per Romer LJ; *Pearks Ltd v Cullen* (1912) 28 TLR 371; *M & S Drapers (a firm) v Reynolds* [1956] 3 All ER 814 at 817, [1957] 1 WLR 9 at 13, CA, per Hodson LJ.

2 'A man whose business is a corn miller's business, and who requires to protect that, cannot, if he has also a furniture business, require the covenantee, who enters into his service as an employee in the corn business, to enter into covenants restricting him from entering into competition with him in the furniture business also': *Henry Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322 at 327, CA, per Farwell LJ. See also *Ehrman v Bartholomew* [1898] 1 Ch 671; *Great Western and Metropolitan Dairies Ltd v Gibbs* (1918) 34 TLR 344; *Ropeways Ltd v Hoyle* (1919) 88 LJCh 446; *Vincent of Reading v Fogden* (1932) 48 TLR 613; cf *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266 at 269, [1954] 1 WLR 815 at 819, CA, where a covenant in a partnership agreement was held not to be too wide merely because it extended to salaried employment, or employment at a wage, in a similar or competing business.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/C. EXTENT OF AREA OF OPERATION/399. Reasonableness as to area.

## **C. EXTENT OF AREA OF OPERATION**

### **399. Reasonableness as to area.**

The reasonableness of an area of restraint depends upon the nature of the business to be protected<sup>1</sup> and the manner in which it is carried on. Where it is a business carried on by a small number of people, with customers widely distributed, a very large area will be allowed<sup>2</sup>, and a wider restraint may be reasonable in a business carried on by agents or correspondence<sup>3</sup> than in one necessitating constant attendance in person<sup>4</sup>.

The restraint may be reasonable even if its area is apparently greater than the area of the business of the covenantee<sup>5</sup>.

A sales representative may reasonably be restrained from representing a rival firm over the same ground<sup>6</sup>.

1 In a credit betting business an area restraint, as distinct from a covenant against solicitation of customers, may be inappropriate: see *SW Strange Ltd v Mann* [1965] 1 All ER 1069, [1965] 1 WLR 629. It must always depend on the particular circumstances whether an area restriction between an employer and employee can be supported, ie the nature of the employer's business and the nature of the employment and all the other circumstances of the particular case: see *T Lucas & Co Ltd v Mitchell* [1972] 2 All ER 1035, [1972] 1 WLR 938; revsd on other grounds [1974] Ch 129, [1972] 3 All ER 689, CA. As to co-operative trading see *Bellshill and Mossend Co-operative Society Ltd v Dalziel Co-operative Society Ltd* [1960] AC 832, [1960] 1 All ER 673, HL, where an arbitration award restricting a co-operative society from trading in a particular area was held not binding (disapproving *Birtley and District Co-operative Society Ltd v Windy Nook and District Industrial Co-operative Society (No 2)* [1960] 2 QB 1, [1959] 1 All ER 623).

2 *Tallis v Tallis* (1853) 1 E & B 391 (publisher; London and 150 miles reasonable); *Harms v Parsons* (1862) 32 Beav 328 (horsehair manufacturers; 200 miles reasonable); *Harvey v Corpe* (1885) 79 LT Jo 246 (army meat contractors; restraint over Europe reasonable); *Moenich v Fenestre* (1892) 67 LT 602, CA (agent and commission merchant; United Kingdom reasonable); *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, CA (eastern hemisphere reasonable where a new invention to be used in large shops); but in *Dowden and Pook Ltd v Pook* [1904] 1 KB 45, CA, a world-wide restraint was held unreasonable in view of the limited nature of the covenantees' business; and in *Stuart and Simpson v Halstead* (1911) 55 Sol Jo 598, the United Kingdom was held too wide in the case of an advertising agent; *Caribonum Co Ltd v Le Couch* (1913) 109 LT 385 (on appeal 109 LT 587, CA); *SV Nevanas & Co Ltd v Walker and Foreman* [1914] 1 Ch 413 (meat importer; United Kingdom; too wide); *Goldsoll v Goldman* [1915] 1 Ch 292, CA (dealer in imitation jewellery; United States and many European countries; too wide); *Spence v Mercantile Bank of India Ltd* (1921) 37 TLR 390 (on appeal 37 TLR 745, CA) (covenant by clerk of bank doing business in certain eastern countries not to enter service of any eastern bank; too wide); *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793, CA ('the wool trade'; no limit in time or space; too wide); *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, PC (world-wide restriction; too wide); *Connors Bros Ltd v Connors* [1940] 4 All ER 179, PC (whole of Canada; reasonable; unnecessary to prove sales in every part); *Vandervell Products Ltd v McLeod* [1957] RPC 185 at 190-191, CA (engineering foreman; two years; no limit of space; too wide); *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA (plastics technician; one year; no limit of space; too wide). Cf *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, [1977] 1 WLR 1472, CA (covenant construed as extending only to United Kingdom). See also *Putsman v Taylor* [1927] 1 KB 637, DC (on appeal [1927] 1 KB 741, CA); *Spencer v Marchington* [1988] IRLR 392 (employment agency; two years; within 25 miles of Banbury; too wide); *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214, CA (employment agency; six months; within 1.2 square miles, including most of the City of London; too wide); *Marley Tile Co Ltd v Johnson* [1982] IRLR 75, CA ('not to compete in any area in which [the covenantor] was active'; too wide); *JA Mont (UK) Ltd v Mills* [1993] IRLR 172, CA (no area limit; too wide); and see the cases cited in note 6 and PARA 401 note 2.

3 Eg a solicitor (*Bunn v Guy* (1803) 1 Smith KB 1 (150 miles round London reasonable); *Galsworthy v Strutt* (1848) 1 Exch 659 (50 miles from Ely Place reasonable); *Austen v Boys* (1858) 2 De G & J 626 (100 miles, but question of area not in issue); *Howard v Woodward* (1864) 10 Jur NS 1123 (50 miles reasonable); *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 573, HL, per Lord Macnaghten, approving *Whittaker v Howe* (1841) 3 Beav 383 (solicitor; England and Scotland reasonable); but in *Woodbridge & Sons v Bellamy* [1911] 1 Ch 326 at 327, CA, Cozens-Hardy MR doubted the reasonableness of restraining a solicitor's

clerk from doing business for any client within an area, as opposed to carrying on business within the area (see PARA 431)); or an accountant (*Isitt and Jenks v Ganson* (1899) 43 Sol Jo 744 (England reasonable)); or a stockbroker (*Lyddon v Thomas* (1901) 17 TLR 450 (50 miles reasonable)). See further the list of trades, professions etc set out in PARA 432.

4 Eg a doctor (*Davis v Mason* (1793) 5 Term Rep 118 (10 miles reasonable); *Hayward v Young* (1818) 2 Chit 407 (20 miles reasonable); *Hastings v Whitley* (1848) 2 Exch 611 (10 miles reasonable); *Sainter v Ferguson* (1849) 7 CB 716 (7 miles reasonable); *Giles v Hart* (1859) 1 LT 154 (5 miles reasonable); *Everton v Longmore* (1899) 15 TLR 356, CA (5 miles reasonable); *Whitehill v Bradford* [1952] Ch 236, [1952] 1 All ER 115, CA (10 miles reasonable); cf *Lyne Pirkis v Jones* [1969] 3 All ER 738, [1969] 1 WLR 1293, CA (see note 5)); or a dentist (*Horner v Graves* (1831) 7 Bing 735 (100 miles unreasonable); *Mallan v May* (1843) 11 M & W 653 (London (then containing 1,500,000 inhabitants) reasonable; but any of the towns in England or Scotland where covenantees might have been practising during term of service unreasonable)); or a schoolmaster (*Smith v Hawthorn* (1897) 76 LT 716 (9 miles reasonable)); or a canvasser in a local area (*Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL (25 miles of London, or of any place where he was employed by the covenantees, unreasonable)); or a laboratory assistant (*Eastes v Russ* [1914] 1 Ch 468, CA (London; 10 miles of laboratory; no time limit; unreasonable)); or a cashier (*Great Western and Metropolitan Dairies Ltd v Gibbs* (1918) 34 TLR 344 (20 miles unreasonable)); or a manager (*Empire Meat Co Ltd v Patrick* [1939] 2 All ER 85, CA (butcher's shop; 5 miles unreasonable)). See the list of trades, professions etc set out in PARA 432.

5 *Tallis v Tallis* (1853) 1 E & B 391 at 411 per Lord Campbell CJ; cf *Gale v Reed* (1806) 8 East 80; *Whittaker v Howe* (1841) 3 Beav 383; *Harms v Parsons* (1862) 32 Beav 328. See also *Lyne-Pirkis v Jones* [1969] 3 All ER 738, [1969] 1 WLR 1293, CA, where in relation to a general medical practice in which substantially all the patients were within a 5 mile radius, a restraint of 10 miles was held void on other grounds. On the other hand, a comparatively small area may cover large towns unconnected with the place where the business is carried on, and so be unreasonable: see eg *D Bates & Co v Dale* [1937] 3 All ER 650 at 654 (accountant, 15 years; 15 miles from Leek Town Hall; void).

6 *Mumford v Gething* (1859) 7 CBNS 305; *Parsons v Cotterill* (1887) 56 LT 839 (traveller to wine and spirit merchant; 50 miles of Burton-on-Trent; no limit of time; held reasonable, the covenantee's business extending over the whole area); *Cussen v O'Connor* (1893) 32 LR Ir 330 (traveller restrained from travelling in any county in which he had travelled for covenantee); cf *Chafer Ltd v Lilley* [1947] LJR 231 (traveller in Wisbech district; restraint throughout United Kingdom; too wide). See also *Gledhow Autoparts Ltd v Delaney* [1965] 3 All ER 288, [1965] 1 WLR 1366, CA (restraint on dealing with all garages in area, not merely those called upon, too wide).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/C. EXTENT OF AREA OF OPERATION/400. Residence.

#### 400. Residence.

A restraint against residing in a neighbourhood, apart from actually carrying on business there, may be a necessary measure of protection<sup>1</sup>.

<sup>1</sup> *Atkyns v Kinnier* (1850) 4 Exch 776 (surgeon); cf *Rawlinson v Clarke* (1845) 14 M & W 187 (surgeon; the validity of the covenant against residing was not in issue). In *Dendy v Henderson* (1855) 11 Exch 194 at 199 per Alderson B, the point was raised but not decided. Cf *Wilkinson v Wilkinson* (1871) LR 12 Eq 604, where a condition in a will requiring a legatee to reside elsewhere than at the place where her husband had to live was held void; *Edmundson v Render* [1905] 2 Ch 320 at 323 per Buckley J; *Denny's Trustee v Denny and Warr* [1919] 1 KB 583; and **WILLS** vol 50 (2005 Reissue) PARA 436.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/C. EXTENT OF AREA OF OPERATION/401. Restraint extending outside the United Kingdom.



#### 401. Restraint extending outside the United Kingdom.

A restraint extending beyond the United Kingdom<sup>1</sup>, and even over the whole world, may be reasonable if the covenantee's business is such as to require so extensive a protection<sup>2</sup>. It is uncertain whether a restraint unlimited in terms or expressly extending beyond the United Kingdom, and reasonable if only applied to the United Kingdom, is to be considered void because such extension is unreasonable<sup>3</sup>.

1 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 s 5, Sch 1. As to the meaning of 'Great Britain' see PARA 395 note 2. Neither the Isle of Man nor the Channel Islands are within the United Kingdom. See further **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 3.

2 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, HL (manufacture of guns and ammunition with a limited number of customers all over the world); see at 550 per Lord Herschell LC, and at 554 per Lord Watson. Since *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd*, the view of the law expressed in *Allsopp v Wheatcroft* (1872) LR 15 Eq 59 at 64 per Wickens V-C, that 'a covenant not to carry on a lawful trade, unlimited as to space, is on the face of it void', must no longer be regarded as the true view; and *Ward v Byme* (1839) 5 M & W 548 is overruled so far as it is an authority for that proposition. As to the development of the law generally see PARA 386 et seq. For restraints beyond the United Kingdom see also *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA, which decided that a hay and straw merchant with business in the United Kingdom, France, Belgium, and Canada may, apparently, restrain an employee from engaging in the business in those countries; but if the extension beyond the United Kingdom is unreasonable, the covenant is severable; *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, CA; *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 (rubber tyre company; restraint as to United Kingdom held good; extensions to France and Germany severable). For instances of world-wide restraints held good see *Rousillon v Rousillon* (1880) 14 ChD 351; *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447; *Ropeways Ltd v Hoyle* (1919) 88 LJCh 446 (obiter); *Scully (UK) Ltd v Lee* [1998] IRLR 259, CA. For a restraint as to Europe held to be good see *Leather Cloth Co v Lorscheid* (1869) LR 9 Eq 345.

3 *Leather Cloth Co v Lorscheid* (1869) LR 9 Eq 345 at 351 per James V-C ('If the covenant is good as to Great Britain, we need not concern ourselves with its extension to France and Germany'); *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630 at 651, CA, per Lindley LJ (it is not contrary to public policy to give effect to a covenant entered into for the purpose of preventing a man from assisting foreigners to compete with an English trader who has bought his business) (affd [1894] AC 535 at 550, HL, per Lord Herschell, and at 574 per Lord Macnaghten; see PARA 386 note 11); *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 307, CA, per Lindley MB ('If the restraint is unreasonable as to the foreign countries named, which I do not think it is, still the agreement as to them is clearly severable from that part of it which relates to this country'); cf at 308 per Rigby LJ. In *Dowden and Pook Ltd v Pook* [1904] 1 KB 45, CA, a covenant unlimited as to space was treated as covering the whole world, and therefore unreasonably wide (applied in *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA, where the court declined to sever the restriction); cf *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, [1977] 1 WLR 1472, CA, where the restraint was construed as limited to the United Kingdom. In *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, CA, where the manager of a business having by its nature few and scattered customers covenanted not to be engaged in a similar business in the eastern hemisphere, the Court of Appeal (Cozens-Hardy LJ dissenting) treated the question as open, however, and, as the covenant was held to be reasonable to its fullest extent, no decision was necessary; cf at 367 per Vaughan Williams LJ. The decision in *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, PC, where a world-wide restraint was held unreasonable and void, does not decide this point since it appears that the restraint would have been unreasonable even if confined to Canada. The point is in most cases an academic one since the restraint is usually severable: see *Goldson v Goldman* [1915] 1 Ch 292, CA, where a restraint unreasonable as to foreign countries and reasonable as to the United Kingdom and the Isle of Man was held severable and enforceable as to the latter part.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/C. EXTENT OF AREA OF OPERATION/402. Measurement of distance.

#### 402. Measurement of distance.

In measuring distance, unless the contract<sup>1</sup> contains words to the contrary<sup>2</sup>, the measurement is to be made not by the nearest accessible way, but in a straight line on a map, disregarding actual inequalities of the surface<sup>3</sup>.

When the distance between houses is in question, the measurement should be between the nearest points of each, not between the doors<sup>4</sup>.

If by the contract the distance is to be measured by the usual streets or ways of approach, it must be measured by any usual public way, not necessarily by that which is most frequented<sup>5</sup>.

1 As to the measurement of distances for the purposes of statutes see the Interpretation Act 1978 s 8; and **STATUTES** vol 44(1) (Reissue) PARA 1387.

2 See eg *Atkins v Kinnier* (1850) 4 Exch 776 (2½ miles 'measuring by the usual streets or ways of approach'); *Smith v Hancock* [1894] 2 Ch 377, CA ('measured by the nearest cart road').

3 *Moufflet v Cole* (1872) LR 8 Exch 32, Ex Ch, following *Leigh v Hind* (1829) 9 B & C 774 at 779 per Parke J, and *Duignan v Walker* (1859) John 446, and disapproving *Woods v Dennett* (1817) 2 Stark 89, and the view of the majority of the court in *Leigh v Hind*. Cf *Robertson v Buchanan* (1904) 73 LJCh 408, CA ('as the crow flies').

4 *Moufflet v Cole* (1872) LR 8 Exch 32, Ex Ch.

5 *Atkins v Kinnier* (1850) 4 Exch 776; cf *Hares v Curtin* [1913] 2 KB 328, DC.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/D. DURATION OF RESTRAINT/403. Restraint as to time in general.

## **D. DURATION OF RESTRAINT**

### **403. Restraint as to time in general.**

The length of the period of restraint is an important matter for consideration<sup>1</sup>, but the absence of a limit will not make a restraint void if it is otherwise reasonable<sup>2</sup>, for it is reasonable that a restraint imposed, in respect of the limit as to time, for the protection of a business should be wide enough to protect that business in the hands not only of the covenantee, but also of his legatee, representative or assignee, and with this object the restraint may be co-extensive with the lifetime of the covenantor<sup>3</sup>, and is not affected by the fact that the original covenantee has ceased to carry on business<sup>4</sup> or is dead<sup>5</sup>.

1 *Proctor v Sargent* (1840) 2 Man & G 20; *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 771, CA, per Fletcher Moulton LJ, and at 774 per Farwell LJ; *Eastes v Russ* [1914] 1 Ch 468, CA (assistant in pathological laboratory; 10 miles; no time limit; bad); *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793, CA (manager; wool trade; no time limit; bad); *Pellow v Ivey* (1933) 49 TLR 422 (hairdresser and tobacconist; within the borough; no time limit; bad); *M & S Drapers (a firm) v Reynolds* [1956] 3 All ER 814, [1957] 1 WLR 9, CA (collector salesman; five years; bad); *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, [1966] 1 All ER 126, CA (tie to one supplier of petrol; 12 years; bad); *Eso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL (tie of under five years reasonable; tie of 21 years unreasonable); *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA (21 year underlease with exclusive purchasing term as to petrol; break clauses after seven and 14 years; reasonable); see *Dayer-Smith v Hadsley* (1913) 108 LT 897, CA (affd sub nom *Hadsley v Dayer-Smith* [1914] AC 979, HL); *Scully (UK) Ltd v Lee* [1998] IRLR 259, CA (non-solicitation covenant in contract of employment for two years after termination of employment unreasonable); cf *Joseph Evans & Co Ltd v Heathcote* [1918] 1 KB 418, CA (agreement to control prices; no time limit or power of withdrawal; bad).

2 *Chesman v Nainby* (1727) 1 Bro Parl Cas 234, HL (linen-draper; half mile; no time limit; good); *Colmer v Clark* (1734) 7 Mod Rep 230 (tally-man; within City and Westminster; seven years; good); *Hayward v Young* (1818) 2 Chit 407 (surgeon; 20 miles; no time limit; good); *Hitchcock v Coker* (1837) 6 Ad & El 438, Ex Ch (druggist; 3 miles; no time limit; good); *Archer v Marsh* (1837) 6 Ad & El 959 (carrier; not to compete; no time limit; good); *Mallan v May* (1843) 11 M & W 653 (dentist; London; no time limit; good); *Nicholls v Stretton* (1847) 10 QB 346 (solicitor; not to act for clients of covenantee; no time limit; good); *Elves v Crofts* (1850) 10 CB 241 (butcher; 5 miles; no time limit; good); *Giles v Hart* (1859) 1 LT 154 (surgeon; 5 miles; no time limit; good); *Catt v Tourle* (1869) 4 Ch App 654 (publican; tied house covenant on conveyance of land; no time limit; good); *Jacoby v Whitmore* (1883) 49 LT 335, CA (oil and colour man; no time limit; good); *Davies v Davies* (1887) 36 ChD 359 at 390, CA, per Bowen LJ; *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169 (corn dealer; 2 miles; no time limit; good); *Haynes v Doman* [1899] 2 Ch 13 at 18, CA, per Stirling J, and at 23 per Lindley LJ; *Fitch v Dewes* [1921] 2 AC 158, HL (solicitor's managing clerk; 7 miles; no time limit; good). Sometimes the time limit is 'so long as the covenantee carries on business', or similar words; and cf *Short Horn Dairy Co v Hall* (1887) 83 LT Jo 45, where the carrying on of a company's business by a receiver and manager in a debenture holder's action was held not to be carrying on business within the meaning of the covenant; see **EMPLOYMENT** vol 39 (2009) PARAS 19-20.

3 *Hitchcock v Coker* (1837) 6 Ad & El 438 at 454, Ex Ch; *Haynes v Doman* [1899] 2 Ch 13 at 18, CA, per Stirling J; cf *Chesman v Nainby* (1727) 1 Bro Parl Cas 234, HL; *Bunn v Guy* (1803) 1 Smith KB 1; *Hayward v Young* (1818) 2 Chit 407; *Williams v Williams* (1818) 2 Swan 253; *Bryson v Whitehead* (1822) 1 Sim & St 74; *Wickens v Evans* (1829) 3 Y & J 318; *Archer v Marsh* (1837) 6 Ad & El 959; *Price v Green* (1847) 16 M & W 346, Ex Ch (covenant enforced by executor of covenantee); *Pemberton v Vaughan* (1847) 10 QB 87; *Atkins v Kinnier* (1850) 4 Exch 776; *Avery v Langford* (1854) Kay 663; *Benwell v Inns* (1857) 24 Beav 307; *Gravelly v Barnard* (1874) LR 18 Eq 518; *Jacoby v Whitmore* (1883) 49 LT 335, CA; *Smith v Hawthorn* (1897) 76 LT 716; *Baines v Geary* (1887) 35 ChD 154 (assigns mentioned); *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169; but see *Berlitz School of Languages v Duchêne* (1903) 6 F 181, Ct of Sess; and **EMPLOYMENT** vol 39 (2009) PARAS 19-20. If the restriction as to space is considered to be reasonable, it is seldom in a case where the sale of a goodwill is concerned that the restriction can be held to be unreasonable because there is no limit as to time; *Connors Bros Ltd v Connors* [1940] 4 All ER 179 at 195, PC.

4 *Elves v Crofts* (1850) 10 CB 241, where the business had ceased to be carried on either by the covenantee or by any assign, the plaintiff being the original covenantee; *Jacoby v Whitmore* (1883) 49 LT 335, CA; *Automobile Carriage Builders Ltd v Sayers* (1909) 101 LT 419, where the benefit of a restrictive covenant with partners who assigned to a company was held to pass to the assignee; *Townsend v Jarman* [1900] 2 Ch 698 at 703.

5 *Hastings v Whitley* (1848) 2 Exch 611 (action by executors of covenantee on covenant not to carry on business as a surgeon at a particular place at any time); *Smith v Hawthorn* (1897) 76 LT 716.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/D. DURATION OF RESTRAINT/404. Contracts of employment.

#### 404. Contracts of employment.

The doctrine of restraint of trade has normally no application to restrictions which operate during the period of employment, but where the restrictions may have the effect of sterilising rather than absorbing a person's capacity for work the contracts may be subject to examination<sup>1</sup>. With that qualification, an employer may secure the whole time of his employee during the period of service<sup>2</sup>, which may last for the employee's lifetime<sup>3</sup>. However, a restraint, although it is reasonable if applied during the period of service, may be unreasonably wide if applied after the termination of that period, and where a covenantor during the period left his service without having been dismissed, the restraint was only enforced by injunction for the residue of the period<sup>4</sup>.

1 *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 328-329, [1967] 1 All ER 699 at 726-727, HL, per Lord Pearce (citing *Young v Timmins* (1831) 1 Cr & J 331), and at 336 and 732 per Lord Wilberforce; *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL. The observation of Branson J in *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 at 214, [1936] 3 All ER 160 at 163

('Where . . . the covenants are all concerned with what is to happen whilst the defendant is employed by the plaintiffs and not thereafter, there is no room for the application of the doctrine of restraint of trade') is too widely stated.

2 *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 at 455, CA, per Lindley MR, and at 458 per Chitty LJ. Cf the covenants in *Homer v Ashford and Ainsworth* (1825) 3 Bing 322 (not to work for any other person during term of service); *King v Hansell* (1860) 5 H & N 106 (commission agent during term of service not to engage in same trade within 10 miles); *Allsopp v Wheatcroft* (1872) LR 15 Eq 59 (during the term of service not to engage in the sale of any other articles or goods whatsoever); *Welstead v Hadley* (1904) 21 TLR 165, CA; *Tivoli, Manchester, Ltd v Colley* (1904) 20 TLR 437; *Hartley v Cummings* (1847) 5 CB 247, where an agreement to serve the employer and his partners for seven years, and not during the term to serve anybody else or join any workmen's union without consent; to give instruction gratis if required; the employer to make minimum weekly payments, and if necessary provide work to keep the wage up to the minimum, with power, in case of the employee's illness or misconduct or the employers' discontinuance of business, to employ any other person and to cease to pay wages, was held no restraint of trade; *Pilkington v Scott* (1846) 15 M & W 657, where an agreement to serve for seven years at certain wages when and so long as the employee should be employed, and not to work for any other person during the term, with liberty to the employers to employ any other person in case of illness and an option to dismiss at one month's notice was held mutual, reasonable and made on good consideration; it was also held that there was an undertaking to employ for the seven years; but see *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL, where a song-writer's undertaking to provide exclusive services and to assign copyrights to the publishers who were under no obligation to publish was held in restraint of trade and invalid; *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237, [1975] 1 WLR 61, CA; and cf *Phillips v Stevens* (1899) 15 TLR 325, DC; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, [1936] 3 All ER 160; *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All ER 1686; cf *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793, CA (ex-employee on pension; agreement held in restraint of trade) (followed in *Bull v Pitney-Bowes Ltd* [1966] 3 All ER 384, [1967] 1 WLR 273). See also *Eastham v Newcastle United Football Club Ltd* [1964] Ch 413, [1963] 3 All ER 139; *Greig v Insole* [1978] 3 All ER 449, [1978] 1 WLR 302. As to the enforcing by injunction of express and implied negative covenants in contracts of service see **CIVIL PROCEDURE** vol 11 (2009) PARA 448 et seq. As to proceedings for procuring breach of contracts of service see **TORT** vol 45(2) (Reissue) PARAS 688-692.

3 *Wallis v Day* (1837) 2 M & W 273; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, [1936] 3 All ER 160. Cf *WH Milsted & Son Ltd v Hamp and Ross and Glendinning Ltd* [1927] WN 233, where such a contract of service terminable only by notice given by the employer was held bad by Eve J, as being 'wholly one-sided'; and see the cases cited in note 2; and **EMPLOYMENT** vol 39 (2009) PARA 20. An injunction will not be granted to enforce a covenant applicable during the period of the covenantor's engagement if the granting of the injunction would be equivalent to enforcing specifically an agreement for personal service: *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 at 455-456, CA; *Ehrman v Bartholomew* [1898] 1 Ch 671 at 674; *Rely-a-Bell Burglar and Fire Alarm Co Ltd v Eisler* [1926] Ch 609; *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209, [1936] 3 All ER 160; see **CIVIL PROCEDURE** vol 11 (2009) PARA 448 et seq.

4 *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA; *Rely-a-Bell Burglar and Fire Alarm Co Ltd v Eisler* [1926] Ch 609. Cf *Ehrman v Bartholomew* [1898] 1 Ch 671.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/D. DURATION OF RESTRAINT/405. Transfer of Undertakings (Protection of Employment) Regulations 2006.

#### **405. Transfer of Undertakings (Protection of Employment) Regulations 2006.**

A restrictive covenant in an employee's contract of employment which is to come into force on the termination of his employment is capable of transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006<sup>1</sup> and as such is enforceable by the purchaser of the employer's business<sup>2</sup>.

<sup>1</sup> See the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246, reg 4; and **EMPLOYMENT** vol 39 (2009) PARA 114. The regulations implement EC Council Directive 2001/23 (OJ L82, 22.3.2001, p 16) on the approximation of the law relating to business transfers.

2 *Morris Angel & Son Ltd v Hollande* [1993] 3 All ER 569, [1993] ICR 71, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/D. DURATION OF RESTRAINT/406. Term of lease.

#### **406. Term of lease.**

Where a covenant in restraint of trade accompanies an assignment of the term of a lease, it is not limited to the length of the term<sup>1</sup> unless it is expressly so provided<sup>2</sup>.

1 *Elves v Crofts* (1850) 10 CB 241.

2 Eg as in *Mitchel v Reynolds* (1711) 1 P Wms 181, where the restraint was limited to the term (five years) of the lease assigned; *Hinde v Gray* (1840) 1 Man & G 195, where the restraint was limited to the term of the lease, but was held void because it was unlimited as to space; *Rannie v Irvine* (1844) 7 Man & G 969.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/E. CUSTOMERS AND NAME/407. Restraint as to customers.

### **E. CUSTOMERS AND NAME**

#### **407. Restraint as to customers.**

A restraint may be reasonable because it is limited to dealings with particular persons, for instance the persons who were customers of a business during the period of the covenantor's service<sup>1</sup>, or a particular trade rival<sup>2</sup>.

However, the fact that a restraint relates to the covenantor's customers before his service with the covenantee began may be a factor weighing against the validity of the restriction<sup>3</sup>.

In the absence of an express covenant, the general law does not afford protection to an employer against a former employee soliciting the employer's customers<sup>4</sup>.

1 *Nicholls v Stretton* (1847) 10 QB 346, where a restraint on a solicitor's clerk against acting for (1) persons who had been clients during the term of service, and (2) persons who might thereafter become clients, was held as to the first restraint reasonable, and as to the second severable; *Baines v Geary* (1887) 35 ChD 154, where a restraint on a milk carrier against serving 'any of the customers served by or belonging at any time' to the covenantee, was held divisible into (a) customers during the term of service, (b) customers at any other time, and (a) was held reasonable, and (b) severable; but as to severability see PARAS 433-434. This distinction as to customers appears to be still valid in spite of the dicta in *Dubowski & Sons v Goldstein* [1896] 1 QB 478 at 482, CA, per Lord Esher MR, and at 485 per Rigby LJ. These were not followed by Neville J in *Konski v Peet* [1915] 1 Ch 530, or by Lawrence J in *East Essex Farmers Ltd v Holder* [1926] WN 230. See also *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA (applied in *GW Plowman & Son Ltd v Ash* [1964] 2 All ER 10, [1964] 1 WLR 568, CA); *Home Counties Dairies Ltd v Skilton* [1970] 1 All ER 1227, [1970] 1 WLR 526, CA. The fact that a particular customer has indicated an unwillingness to continue doing business with the covenantee is not a reason for refusing relief: *John Michael Design plc v Cooke* [1987] 2 All ER 332 at 334, [1987] ICR 445 at 448, CA. A restraint may be unreasonable if the restraint, although limited as to persons, covers all business whatever (*Morris & Co v Ryle* (1910) 26 TLR 678, CA), or if it covers customers outside the area of the covenantor's employment (*Spafax (1965) Ltd v Dommett* (1972) 116 Sol Jo 711, CA, where a salesman for West

Cornwall, whose employer's business was countrywide, was restrained from dealing with anyone who was a customer of the employer at the date of termination of his employment, and the restraint was held to be too wide; *Financial Collection Agencies (UK) Ltd v Batey* (1973) 117 Sol Jo 416, CA). A restraint against soliciting potential customers of the employer would be unreasonable: *Business Seating (Renovations) Ltd v Broad* [1989] ICR 729 at 734 per Millett J. A restraint against soliciting persons who become customers after the termination of the contract of employment is unreasonable: *Austin Knight (UK) v Hinds* [1994] FSR 52; *Aramark plc v Somerville* 1995 SLT 749.

2 *Howard v Danner* (1901) 17 TLR 548, where a covenant by a restaurant waiter not during the year to enter the service of a specified rival restaurant was held good. See also *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, [1977] 1 WLR 1472, CA.

3 See *M & S Drapers (a firm) v Reynolds* [1956] 3 All ER 814 at 816, [1957] 1 WLR 9 at 13, CA, per Hodson LJ, and at 818-819 and 17-18 per Morris LJ, where a large proportion of customers covered by a covenant entered into by a collector salesman for credit drapers had formed a connection with the defendant salesman before he entered the plaintiffs' service.

4 *Wallace Bogan & Co v Cove* [1997] IRLR 453, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/E. CUSTOMERS AND NAME/408. Restraint as to name.

#### **408. Restraint as to name.**

A person may be restrained from carrying on business anywhere under a particular name<sup>1</sup> or in a particular capacity<sup>2</sup> or from representing himself, even truthfully, to have been connected in trade with the covenantee<sup>3</sup> provided the restraint is reasonable<sup>4</sup>.

1 *Vernon v Hallam* (1886) 34 ChD 748. As to the application of this principle to companies see **COMPANIES** vol 14 (2009) PARA 196 et seq; see also **PARTNERSHIP** vol 79 (2008) PARAS 27, 172, 213.

2 *Wallis v Day* (1837) 2 M & W 273, where the covenantor was never to trade on his own account, but only as assistant to the covenantee for weekly payments.

3 *Wolmershausen v O'Connor* (1877) 36 LT 921, where a covenant by a retiring partner not to carry on business within 10 miles of O, and not, by publication, advertisement, circular, or otherwise, to hold himself out as formerly connected with the covenantee was held reasonable, and a breach to describe himself as 'late of O and formerly of M,' at which places the partners had carried on, and the covenantee continued to carry on business.

4 *Hepworth Manufacturing Co Ltd v Ryott* [1920] 1 Ch 1, CA, where a covenant by a film actor not to use his stage name, after the determination of his contract, for any purpose whatever was held unreasonable.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/F. CONFIDENTIAL MATTERS/409. Sale of trade secret.

### **F. CONFIDENTIAL MATTERS**

#### **409. Sale of trade secret.**

A contract not to divulge a trade secret may be reasonable even though unlimited as to space or time, and a restraint imposed in order to give effect to such a contract would apparently be treated in the same way, but in no case has an absolutely unlimited restriction been under consideration<sup>1</sup>.

1 *Bryson v Whitehead* (1822) 1 Sim & St 74, where in settling the terms of a deed to give effect to an agreement to sell a dyer's business with a trade secret, Leach V-C directed a covenant, unlimited as to space, to restrain the use of the secret for 20 years, ie a general covenant when general covenants were regarded as of necessity void (see PARA 386); *Leather Cloth Co v Lorstont* (1869) LR 9 Eq 345 at 354 per James V-C; *Allsopp v Wheatcroft* (1872) LR 15 Eq 59 at 64 per Wickens V-C, commenting on *Leather Cloth Co v Lorstont*; *Hagg v Darley* (1878) 47 LJCh 567, where there was no limit of space, but a limit of time for 14 years; *Davies v Davies* (1887) 36 ChD 359 at 384, CA, per Cotton LJ, commenting on *Leather Cloth Co v Lorstont*; see also *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 710, HL, per Lord Parker of Waddington; cf *Haynes v Doman* [1899] 2 Ch 13, CA; *Caribonum Co Ltd v Le Couch* (1913) 109 LT 385 (on appeal 109 LT 587, CA).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/F. CONFIDENTIAL MATTERS/410. Confidential information and statutory exemption.

#### 410. Confidential information and statutory exemption.

The obligation not to disclose confidential information or to act in breach of confidence imposed by the general law<sup>1</sup> is not invalidated by the doctrine of restraint of trade. In addition an employer may be entitled to enforce a restrictive covenant taken for his protection against an ex-employee where, from the nature of the business or of the employment, the ex-employee has special opportunities of becoming acquainted with the customers and of acquiring confidential information such as trade secrets<sup>2</sup>. There is an implied term imposed on the employee after the termination of his employment not to disclose information of a sufficiently high degree of confidentiality as to amount to a trade secret; this term does not, however, extend to all information which is confidential only in the sense that an unauthorised disclosure to a third party while the employment subsisted would be a clear breach of the duty of good faith<sup>3</sup>.

Where there are contracts or orders for the production of defence materials, the disclosure of technical information in breach of a restrictive covenant is permitted by statute to a covenantor authorised by certain authorities from whom the covenantee is entitled to receive compensation<sup>4</sup>.

1 See **EQUITY** vol 16(2) (Reissue) PARA 855. Information which is merely know-how will not be protected: see *Amways Corp v Eurway International Ltd* [1974] RPC 82; *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, [1986] 1 All ER 617, CA; *Lancashire Fires Ltd v SA Lyons & Co Ltd* [1997] IRLR 113, [1996] FSR 629, CA. Information which is in the public domain is not confidential: *Brooks v Olyslager OMS (UK) Ltd* [1998] IRLR 590, CA. As to the prevention of the disclosure of confidential information generally see **CIVIL PROCEDURE** vol 11 (2009) PARAS 475-476; *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239; *O Mustad & Son v S Allcock & Co Ltd and Dosen* (1928) [1963] 3 All ER 416, [1964] 1 WLR 109n, HL. See also **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 13. As to implied terms in contracts of service not to divulge information see **EMPLOYMENT** vol 39 (2009) PARA 90. As to disclosure generally see **CIVIL PROCEDURE** vol 11 (2009) PARA 538 et seq.

2 *Mineral Water Bottle Exchange and Trade Protection Society v Booth* (1887) 36 ChD 465 at 471, CA; *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447 at 453; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 at 455, CA (confidential clerk); *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 307, CA (distinguishing *Ward v Byrne* (1839) 5 M & W 548); *Haynes v Doman* [1899] 2 Ch 13 at 17-18, CA (traveller); *Barr v Craven* (1903) 20 TLR 51, CA (insurance agent); *White, Tomkins and Courage v Wilson* (1907) 23 TLR 469; *Lewis and Lewis v Durnford* (1907) 24 TLR 64 (solicitor's clerk); *Bromley v Smith* [1909] 2 KB 235 at 240

(milk seller); *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308. Cf *Proctor v Sargent* (1840) 2 Man & G 20 (milk seller); *Cornwall v Hawkins* (1872) 41 LJCh 435 (milk seller); *Middleton v Brown* (1878) 47 LJCh 411, CA (vendor of oil by men in the street); *Forster & Sons Ltd v Suggett* (1918) 35 TLR 87 (engineer); *Fitch v Dewes* [1921] 2 AC 158, HL (solicitor's managing clerk); *Putman v Taylor* [1927] 1 KB 637, DC (on appeal [1927] 1 KB 741, CA) (tailor's cutter and manager); *Kerchiss v Colara Printing Inks Ltd* [1960] RPC 235 (lath manufacturer); *Scorer v Seymour-Johns* [1966] 3 All ER 347, [1966] 1 WLR 1419, CA (estate agent's branch manager and negotiator); *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, [1977] 1 WLR 1472, CA (director of mail order business); *Thomas v Farr plc* [2007] EWCA Civ 118, [2007] ICR 932 (director of insurance broker).

Persons in other employments have been held not to be in a similar confidential position: *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763, CA (reporters); *Pearks Ltd v Cullen* (1912) 28 TLR 371 (shop assistants); *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL (canvassers); *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688, HL (engineers); *Bowler v Lovegrove* [1921] 1 Ch 642 (clerks to estate agents); *Vincent of Reading v Fogden* (1932) 48 TLR 613 (car salesmen). See also *Eastes v Russ* [1914] 1 Ch 468, CA; *Spence v Mercantile Bank of India Ltd* (1921) 37 TLR 390 (on appeal 37 TLR 745, CA). As to the appropriateness of taking a restrictive covenant see *Printers and Finishers Ltd v Holloway* [1964] 3 All ER 731, [1965] 1 WLR 1; *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, [1977] 1 WLR 1472, CA; *Lawrence David Ltd v Ashton* [1991] 1 All ER 385 at 394, CA, doubting *Thomas Marshall (Exports) Ltd v Guinle* [1979] Ch 227, [1978] 3 All ER 193.

3 *Faccenda Chicken Ltd v Fowler* [1987] Ch 117, [1986] 1 All ER 617, CA; see also *Balston Ltd v Headline Filters Ltd* [1987] FSR 330; *Lock International plc v Beswick* [1989] 3 All ER 373, [1989] 1 WLR 1268; *Lansing Linde Ltd v Kerr* [1991] 1 All ER 418, [1991] 1 WLR 251, CA; *TSB Bank plc v Connell* 1997 SLT 1254; *FSS Travel and Leisure Systems Ltd v Johnson* [1998] IRLR 382, CA; *AT Poeton (Gloucester Plating) Ltd v Horton* [2000] ICR 1208, CA. Quere whether it is possible to restrict by an express covenant confidential information not covered by the term implied by law: see *Faccenda Chicken Ltd v Fowler* [1987] Ch 117 at 137, [1986] 1 All ER 617 at 626, CA, per Neill LJ; *Balston Ltd v Headline Filters Ltd* [1987] FSR 330 at 347-348; *Systems Reliability Holdings plc v Smith* [1990] IRLR 377.

4 See the Defence Contracts Act 1958 ss 2-6; and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARAS 588-589.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(iv) Reasonableness between the Parties/F. CONFIDENTIAL MATTERS/411. Knowledge and skill acquired during employment.

#### **411. Knowledge and skill acquired during employment.**

Apart from the protection of trade secrets or confidential information<sup>1</sup>, an employer is not entitled to restrain an employee from making use, after the employment has ceased, of any knowledge or skill gained during the period of employment<sup>2</sup>, but a covenant reasonably necessary to protect an employer against the betrayal of trade secrets or confidential information is not void merely because it unavoidably protects the employer against competition<sup>3</sup>.

1 See PARA 410.

2 *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 710, HL, per Lord Parker of Waddington. See also *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763, CA; *Attwood v Lamont* [1920] 3 KB 571 at 589, CA, per Younger LJ; *Triples Safety Class Co Ltd v Scoriah* [1938] Ch 211 at 215, [1937] 4 All ER 693 at 697; *Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd* [1959] Ch 108, [1958] 2 All ER 65, CA, where an agreement between employers in which no distinction was made between employees possessed of secrets etc and those not so possessed was held void. See also *Vandervell Products Ltd v McLeod* [1957] RPC 185, CA; *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA; and note 3.

3 *Haynes v Doman* [1899] 2 Ch 13 at 23, CA, per Lord Lindley MR; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 710, HL, per Lord Parker of Waddington; *Attwood v Lamont* [1920] 3 KB 571 at 597, CA, per Younger LJ; *Spence v Mercantile Bank of India Ltd* (1921) 37 TLR 390 at 394 per Greer LJ. See also *Forster & Sons Ltd v Suggett* (1918) 35 TLR 87, where the covenant by a works engineer of glass works was not to divulge trade secrets during the period of employment and thereafter, and not to carry on or be interested in any similar



business in the United Kingdom for a period of five years. Cf *Vandervell Products Ltd v McLeod* [1957] RPC 185, CA, where a covenant by an engineering foreman not to take service with a 'competitor' was held not restricted to a competitor in the line of business involving the trade secrets and was therefore too wide; *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(v) Reasonableness in the Public Interest/412. The interests of the public, the covenantee and the covenantor.

## **(v) Reasonableness in the Public Interest**

### **412. The interests of the public, the covenantee and the covenantor.**

A covenant in restraint of trade must be reasonable with reference to the interest of the public<sup>1</sup>. Many agreements or practices which might be detrimental to the public interest may be investigated under the provisions of domestic or European Union competition law<sup>2</sup>.

<sup>1</sup> *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 565, HL, per Lord Macnaghten; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 733, HL, per Lord Haldane LC; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 707, HL, per Lord Parker of Waddington. See also *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 All ER 513, [1972] 1 WLR 814. The effect of a covenant upon the public interest is a separate matter from its effect upon the interests of the parties and must be considered separately: *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305 at 318, CA, per Scrutton LJ; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 708, HL, per Lord Parker of Waddington; but cf *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 324, [1967] 1 All ER 699 at 724, HL, per Lord Pearce. Except in the case of monopoly (see PARA 361 et seq), a restraint reasonably necessary for the covenantee will very seldom be unreasonable with reference to the public interest: see *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, HL; *A-G of Commonwealth of Australia v Adelaide Steamship Co Ltd* [1913] AC 781 at 795-796, PC; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 at 662, 686-688, [1955] 1 WLR 761 at 767, 800, HL; but cf *McEllistrim v Ballymacelligott Co-operative Agricultural and Dairy Society Ltd* [1919] AC 548 at 562, HL, per Lord Birkenhead LC. Where a restrictive agreement is entered into which is no wider than is reasonably necessary for the covenantee's protection in his business, it is difficult to imagine circumstances which will render such an agreement injurious to the public interest; apart from contracts induced by fraud, duress or undue influence or impeachable on any other recognised ground of invalidity, a restriction which is reasonably necessary for the protection of a man's business cannot be held invalid on grounds of public policy unless some specific ground can be clearly established: see *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300 at 305, CA, per Lindley MR, suggesting that some pernicious monopoly may afford such ground. But since, in relation to many agreements containing restrictions, there may be wider issues affecting the interests of the public than those which relate merely to the interests of the parties, it is important that the vitality of the requirement stated in the text should continue to be recognised: see *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 341, [1967] 1 All ER 699 at 735, HL, per Lord Wilberforce.

<sup>2</sup> As to domestic competition law see PARAS 3, 115 et seq; and as to EU competition law see PARA 24 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(vi) Consideration/413. Necessity for valuable consideration.

## **(vi) Consideration**

### **413. Necessity for valuable consideration.**

There must be a valuable and legal consideration for an agreement in restraint of trade<sup>1</sup>, even if the covenant is by deed<sup>2</sup>. The consideration may be shown either on the face of the agreement or by extrinsic evidence<sup>3</sup>, or may be reasonably inferred from the agreement<sup>4</sup>.

1 *Mitchel v Reynolds* (1711) 1 P Wms 181; *Colmer v Clark* (1734) 7 Mod Rep 230; *Gunmakers Co v Fell* (1742) Willes 384 at 388. See also *Re Tovey, ex p Lyne* (1841) 5 Jur 1088.

2 *Mitchel v Reynolds* (1711) 1 P Wms 181 at 192; *Davis v Mason* (1793) 5 Term Rep 118; *Homer v Ashford and Ainsworth* (1825) 3 Bing 322; *Mallan v May* (1843) 11 M & W 653 at 665 per Parke B; *Gravelly v Barnard* (1874) LR 18 Eq 518. Cf *Bunn v Guy* (1803) 1 Smith KB 1 at 11. However, it is to be noted that this point has not really been considered in any case decided under more modern conditions, and for an argument against the proposition that consideration would now be required for a deed see Matthews and Adler's Law relating to Covenants in Restraint of Trade (1907 Edn) p 69 et seq. Cf **CONTRACT** vol 9(1) (Reissue) PARA 621; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 57. As to covenants by deed generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 1 et seq; **EQUITY** vol 16(2) (Reissue) PARA 906.

3 *Mitchel v Reynolds* (1711) 1 P Wms 181; *Homer v Ashford and Ainsworth* (1825) 3 Bing 322; *Hitchcock v Coker* (1837) 6 Ad & El 438, Ex Ch; *Hutton v Parker* (1839) 7 Dowl 739; *Mumford v Gething* (1859) 7 CBNS 305; *Cooper v Southgate* (1894) 10 R 552, DC.

4 *Gravelly v Barnard* (1874) LR 18 Eq 518.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(vi) Consideration/414. Legality of consideration.

#### 414. Legality of consideration.

That the consideration for an agreement in restraint of trade must be legal is obvious<sup>1</sup>. There is no illegality in the sale of a business which depends on the personal character of the person who carries it on, even though the vendor is induced by a mere pecuniary consideration to recommend the purchaser to the clients<sup>2</sup>.

1 *Hitchcock v Coker* (1837) 6 Ad & El 438, Ex Ch.

2 *Bunn v Guy* (1803) 1 Smith KB 1 (solicitor's business); *Candler v Candler* (1821) Jac 225 at 231 per Lord Eldon LC; *Gilfillan v Henderson* (1833) 2 Cl & Fin 1, HL; *Whittaker v Howe* (1841) 3 Beav 383 at 389, 393; *Thornbury v Beville* (1842) 1 Y & C Ch Cas 554. As to public policy generally see PARA 377 note 3; and **CONTRACT** vol 9(1) (Reissue) PARA 841 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(vi) Consideration/415. Sufficiency of consideration.

#### 415. Sufficiency of consideration.

A consideration is sufficient if it has some value and is not merely illusory<sup>1</sup>. Mere employment at will is a sufficient consideration<sup>2</sup>; so is the continuation of an existing employment at will<sup>3</sup>. If the covenantor is already in the employment of the covenantee at the date of the covenant, it will depend upon the particular circumstances of the case whether the covenant was really a part of the contract of service<sup>4</sup>, and even if it was not, there appears to be sufficient

consideration in the fact that if the employee refused to sign the covenant the employer might take the first opportunity of legally determining the service<sup>5</sup>.

When once it is established that there is a consideration of some value, the court will not inquire into its adequacy<sup>6</sup>. However, the quantum of the consideration may be relevant when determining the reasonableness of the agreement<sup>7</sup>, and the one-sidedness of an agreement may be a ground for striking it down<sup>8</sup>.

1 *Austen v Boys* (1858) 2 De G & J 626 at 637 per Lord Chelmsford LC (affg (1857) 24 Beav 598); *Benwell v Inns* (1857) 24 Beav 307, where, on an agreement to employ for one month and thereafter at one month's notice at such wages as might from time to time be agreed upon, it was held that there was sufficient consideration; *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169, where it was held that commission in addition to wages is consideration, as is the mere continuation of a pre-existing engagement. In the case of a waiter who receives tips, 4 shillings a week was not merely a colourable consideration: *Howard v Danner* (1901) 17 TLR 548. Employment at one or two weeks' notice is sufficient consideration, even in the case of a covenantor who is a minor: *Cornwall v Hawkins* (1872) 41 LJCh 435; *Fellows v Wood* (1888) 59 LT 513; *Evans v Ware* [1892] 3 Ch 502 at 504.

2 *Davis v Mason* (1793) 5 Term Rep 118; *Sainter v Ferguson* (1849) 7 CB 716 at 726 per Wilde CJ; *Gravelly v Barnard* (1874) LR 18 Eq 518; *Cooper v Southgate* (1894) 10 R 552 at 553, DC, per Wright J.

3 *Gravelly v Barnard* (1874) LR 18 Eq 518; cf *Hitchcock v Coker* (1837) 6 Ad & El 438, Ex Ch, where the covenantor entered into the covenant after he had entered the service of the covenantee.

4 See *Mumford v Gething* (1859) 7 CBNS 305, where the covenantor orally agreed to serve as a traveller, it being understood that the agreement was to be reduced to writing; having served for three or four weeks the covenantor then sighted the covenant, and it was held that until then the employment was only inchoate, and that if he had refused to sign the plaintiff could have refused to employ him; *Woodbridge & Sons v Bellamy* [1911] 1 Ch 326 at 332, CA, per Eve J, where an employer engaged an employee on 4 April, telling him to begin work on 17 April, and the covenant signed on 16 April was held to be part of the contract of service (the judgment was reversed in the Court of Appeal, but on another point). Cf **EMPLOYMENT** vol 39 (2009) PARA 20.

5 *Woodbridge & Sons v Bellamy* [1911] 1 Ch 326 at 332-333, CA, per Eve J; but see *Coleborne v Kearns* (1912) 46 ILT 305 at 306, CA, per Holmes LJ. See also *Spink (Bournemouth) Ltd v Spink* [1936] Ch 544 at 548, [1936] 1 All ER 597 at 600, where Luxmoore J expresses, obiter, the view that the release by an employer of an employee from a contract of service may be good consideration for a covenant then entered into by the employee. A contract by which a party is promised a pension so long as he does not enter a trade is as much in restraint of trade as one where a party contracts directly not to enter the trade: *Wyatt v Kreglinger and Fernau* [1933] 1 KB 793, CA, followed in *Bull v Pitney-Bones Ltd* [1966] 3 All ER 384, [1967] 1 WLR 273.

6 *Hitchcock v Coker* (1837) 6 Ad & El 438, Ex Ch, overruling on this point the previous cases in which the adequacy or fairness of the consideration had been regarded as matters to be taken into account, namely *Mitchel v Reynolds* (1711) 1 P Wms 181; *Davis v Mason* (1793) 5 Term Rep 118; *Gale v Reed* (1806) 8 East 80 at 86; *Homer v Ashford and Ainsworth* (1825) 3 Bing 322 at 327; *Horner v Graves* (1831) 7 Bing 735; *Young v Timmins* (1831) 1 Cr & J 331; and *Keppell v Bailey* (1834) 2 My & K 517 at 520. For the present rule see *Archer v Marsh* (1837) 6 Ad & El 959; *Leighton v Wales* (1838) 3 M & W 545; *Pilkington v Scott* (1846) 15 M & W 657; *Sainter v Ferguson* (1849) 7 CB 716 at 727 per Coltman J; *Tallis v Tallis* (1853) 1 E & B 391; *Gravelly v Barnard* (1874) LR 18 Eq 518 at 522; *Middleton v Brown* (1878) 47 LJCh 411, CA; *Collins v Locke* (1879) 4 App Cas 674 at 686, PC; *Rousillon v Rousillon* (1880) 14 ChD 351 at 359, 363; *Davies v Davies* (1887) 36 ChD 359, CA; *Evans v Ware* [1892] 3 Ch 502; *Howard v Danner* (1901) 17 TLR 548; *Tivoli, Manchester, Ltd v Colley* (1904) 20 TLR 437; and cf *Price v Green* (1847) 16 M & W 346, Ex Ch; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 at 707, HL, per Lord Parker of Waddington; *Attwood v Lamont* [1920] 3 KB 571 at 589, CA, per Younger LJ; *M & S Drapers (a firm) v Reynolds* [1956] 3 All ER 814, [1957] 1 WLR 9, CA. See also **CONTRACT** vol 9(1) (Reissue) PARA 736; and cf **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 868.

7 *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 565, HL; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] AC 561 at 579, [1975] 1 All ER 968 at 978, PC; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303 at 309-310, [1985] 1 WLR 173 at 179, CA, per Dillon LJ, at 315 and 185 per Dunn LJ and at 319 and 191 per Waller LJ.

8 *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL; *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237, [1975] 1 WLR 61, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(vi) Consideration/416. Partnership.

#### **416. Partnership.**

A partnership determinable at any time on one month's notice is a sufficient consideration for an agreement in restraint of trade<sup>1</sup>. Where a restraint is imposed on a retiring partner, the consideration is the whole of the partnership agreement<sup>2</sup>.

1 *Leighton v Wales* (1838) 3 M & W 545.

2 *Austen v Boys* (1858) 2 De G & J 626 at 637 per Lord Chelmsford LC. As to when a partner will be restrained see **PARTNERSHIP** vol 79 (2008) PARAS 166 et seq, 213-215.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(vii) Parties and Assignees/417. General principles.

#### **(vii) Parties and Assignees**

##### **417. General principles.**

The ordinary rules of contract apply to all questions as to parties to an agreement in restraint of trade<sup>1</sup>, and it is necessary to notice here only restraints in contracts with minors, and assignment and devolution on death<sup>2</sup>.

1 See **CONTRACT** vol 9(1) (Reissue) PARAS 604, 1079 et seq. A receiver and manager of a business has authority to enter into agreements with the employees containing covenants in restraint of trade: *Howard v Danner* (1901) 17 TLR 548; and see **RECEIVERS** vol 39(2) (Reissue) PARA 490.

2 See PARA 418 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(vii) Parties and Assignees/418. Minors.

##### **418. Minors.**

A fair and reasonable restrictive covenant in a contract of service or apprenticeship entered into by a minor will be enforced against him after he comes of age<sup>1</sup>, and the presence of a penalty or liquidated damages clause does not invalidate the whole agreement<sup>2</sup>, but the burden lies on the covenantee to show that the contract as a whole is for the minor's benefit, and that the covenant is only what is usual in such cases<sup>3</sup>.

A reasonably limited covenant is binding on a minor even though it contains restrictions which are void, if those restrictions can be severed<sup>4</sup> from the valid part of the covenant<sup>5</sup>.

1 *Fellows v Wood* (1888) 59 LT 513, DC (dairyman; covenant by minor not to serve persons who were customers during term of service; time, two years; held for benefit of minor); *Evans v Ware* [1892] 3 Ch 502 (dairyman; covenant by minor not to compete; 5 miles; two years; held for minor's benefit); *Gadd v Thompson* [1911] 1 KB 304, DC (covenant by architect's apprentice; 10 miles; ten years; held reasonable) (following *Bromley v Smith* [1909] 2 KB 235 at 242); Cf *Leslie v Fitzpatrick* (1877) 3 QBD 229. If after coming of age a minor continues for a substantial time in the service of an employer under a contract void because it is not for his benefit, a new contract on the same terms will, apparently, be inferred, and its reasonableness will be decided by the rules applicable to an adult: *Hooper and Ashby v Willis* (1905) 21 TLR 691 per Kekewich J (affd (1906) 22 TLR 451, CA, but not on this point, as the restraint was held unreasonable irrespective of minority); cf *Cornwall v Hawkins* (1872) 41 LJCh 435; *Brown v Harper* (1893) 68 LT 488; see **EMPLOYMENT** vol 39 (2009) PARA 16. As to minors' contracts being binding if beneficial as a whole see *Roberts v Gray* [1913] 1 KB 520, CA; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 12. Cf *Hooper and Ashby v Willis* (1905) 21 TLR 691, where it was held that a contract containing a restrictive covenant signed by an employee who was a minor but not by the employer, is not apparently a contract for the minor's benefit. As to the ages of minority and majority see generally **CHILDREN AND YOUNG PERSONS** vol 5(3) (2008 Reissue) PARAS 1-3.

An injunction will not be granted to restrain a breach of a contract of apprenticeship during the apprenticeship (see **CIVIL PROCEDURE** vol 11 (2009) PARA 461), although an apprentice may be held liable to pay the premium as the price of necessities (see *Walter v Everard* [1891] 2 QB 369, CA). It is not certain whether an injunction would be granted, during minority, to restrain a breach of a restrictive covenant in a contract of service: see *De Francesco v Barnum* (1890) 45 ChD 430; and *Gadd v Thompson* [1911] 1 KB 304 at 308, where Phillimore J said that the price of instruction of an apprentice who was a minor need not necessarily be money, but may consist in part of a restrictive covenant. In *Morrison Fleet & Co Ltd v Fletcher* (1900) 17 TLR 95, an injunction was granted by Sir Francis Jeune restraining a covenantor while apparently still under age, although the contract contained a liquidated damages clause. In *Richards v Whitham* (1892) 66 LT 695, CA, it was suggested that in the absence of a covenant by an articulated clerk who was a minor, a person who had entered into a bond for securing that the clerk should not practise within a certain area and was sued on the bond might have a remedy over by injunction against the clerk. As to minors' contracts of apprenticeship see **EMPLOYMENT** vol 39 (2009) PARA 9.

2 *Morrison Fleet & Co Ltd v Fletcher* (1900) 17 TLR 95. Cf *Hayne v Burchell* (1890) 35 Sol Jo 88, CA, where such a clause was present in a minor's covenant but, there being no breach, the question was not raised.

3 *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 769, CA, per Cozens-Hardy MR, but the covenant was there held unreasonable even for an adult; cf *Leslie v Fitzpatrick* (1877) 3 QBD 229 at 232. In *Capes v Hutton* (1826) 2 Russ 357, an injunction was refused where in articles of clerkship to a solicitor, entered into by a minor, the minor covenanted not to practise within 12 miles, and his father covenanted that on coming of age he should enter into a bond to that effect, and, no bond having been executed, the covenantor broke the covenant after coming of age. But apparently the case was decided on the ground that the remedy, if any, lay against the father.

4 As to severability see PARAS 433-434.

5 *Bromley v Smith* [1909] 2 KB 235 at 242, explaining *Corn v Matthews* [1893] 1 QB 310 at 314, CA. If a stipulation in an apprenticeship deed makes the whole contract unfair to the minor, the whole contract is void, but 'the whole contract' means the whole contract so far as it was operative: *Bromley v Smith* at 243 per Channell J; cf *Gadd v Thompson* [1911] 1 KB 304, DC.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(vii) Parties and Assignees/419. Representatives and assignees.

#### **419. Representatives and assignees.**

A covenant imposed for the protection of a business and its goodwill<sup>1</sup> is for the benefit of the business, and not merely of the individual covenantee. The benefit of it passes, therefore, to the representatives or assignees of the covenantee, whether they are expressly mentioned or not<sup>2</sup>. It forms part of the goodwill which passes on an assignment of the business<sup>3</sup>, and it passes to the assignee of part of the business of the original covenantee<sup>4</sup>.

However, on the construction of the covenant a different intention may appear; for instance, a covenant not to trade so as directly or indirectly to affect continuing partners is personal to those partners<sup>5</sup>.

1 As to goodwill see **PERSONAL PROPERTY** vol 35 (Reissue) PARA 1206. See also **PARTNERSHIP** vol 79 (2008) PARA 213 et seq.

2 See PARA 403; and cf *Martin v Brunsden* (1894) 98 LT Jo 237, DC; *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169 (plaintiffs the assignees of the covenantee); *Chafer Ltd v Lilley* [1947] LJR 231; *Marshall and Murray Ltd v Jones* (1913) 29 TLR 351, where, however, the restraint was as to customers served by and from a specified dairy, and it was held not to apply to customers of the same business transferred to another place; *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, CA (plaintiffs sued as equitable assignees). As to tied house covenants in brewers' leases see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 546. See generally **CONTRACT** vol 9(1) (Reissue) PARAS 757-758; **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARAS 335 et seq, 454 et seq.

3 *Jacoby v Whitmore* (1883) 49 LT 335 at 337, CA; *Showell v Winkup* (1889) 60 LT 389; *Batho v Tunks* [1892] WN 101; *John Bros Abergarw Brewery Co v Holmes* [1900] 1 Ch 188; *Townsend v Jarman* [1900] 2 Ch 698 at 703; *Welstead v Hadley* (1904) 21 TLR 165, CA; *Automobile Carriage Builders Ltd v Sayers* (1909) 101 LT 419. See also *Smith v Hawthorn* (1897) 76 LT 716. As to the sale of partnership goodwill generally see **PARTNERSHIP** vol 79 (2008) PARA 213 et seq.

4 *Benwell v Inns* (1857) 24 Beav 307; *Baines v Geary* (1887) 35 ChD 154 at 159.

5 *Davies v Davies* (1887) 36 ChD 359 at 388, 394, CA, where the covenant in question was in addition to a covenant intended to protect the goodwill (distinguishing *Jacoby v Whitmore* (1883) 49 LT 335, CA). For an instance of a covenant not to 'affect' a business being held bad see *Reeve v Marsh* (1906) 23 TLR 24. As to the burden of a restrictive covenant see *Bird v Lake* (1863) 1 Hem & M 111, 338. Cf *Cooke v Colcraft* (1773) 2 Wm Bl 856, where a personal representative was held not to be bound by the testator's covenant. It is submitted that, in principle, the burden of a covenant does not pass to the assignee of the covenantor, although there appears to be no reported case on the subject: see **PARTNERSHIP** vol 79 (2008) PARA 213 et seq. As to tied house covenants see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 546.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/A. IN GENERAL/420. Application of ordinary rules.

## (viii) Form, Construction and Certainty

### A. IN GENERAL

#### 420. Application of ordinary rules.

In construing a contract which is in restraint of trade the ordinary rules applicable to contracts must be applied<sup>1</sup>. No special formalities are required.

1 *Mills v Dunham* [1891] 1 Ch 576, CA; *Dubowski & Sons v Goldstein* [1896] 1 QB 478, CA; *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169; *Haynes v Doman* [1899] 2 Ch 13, CA. As to the rules relating to the construction of contracts see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/A. IN GENERAL/421. Construction by context.

#### 421. Construction by context.

The contract must first be construed without reference to legality or illegality<sup>1</sup>. Where a clause is ambiguous, the maxim 'ut res magis valeat quam pereat' will apply<sup>2</sup>, and words which are general and might impose an unreasonable restraint have frequently, by reference to the context and the circumstances, been construed as having a limited meaning<sup>3</sup>, but only where there is a real ambiguity<sup>4</sup>.

1 *Konski v Peet* [1915] 1 Ch 530 at 538 per Neville J; *Clarke v Newland* [1991] 1 All ER 397 at 402, CA, per Neill LJ.

2 *Mills v Dunham* [1891] 1 Ch 576, CA; *Perls v Saalfeld* [1892] 2 Ch 149, CA; *Cattermoul v Jared* (1909) 53 Sol Jo 244. As to this maxim of construction (that it may be made operative rather than null) see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 177.

3 *Gale v Reed* (1806) 8 East 80, where a covenant against dealing with any persons except public bodies and to employ the covenantee exclusively to make all articles ordered by or for the covenantor's friends was held not to include persons whom the covenantor introduced but the covenantee refused to supply; *Avery v Langford* (1854) Kay 663, where it was held that the words 'any trading establishment' were limited to trade likely to interfere with that of the covenantee; *King v Hansell* (1860) 5 H & N 106, where a covenant general in terms as to time was construed as being limited to the term of the covenantor's service; *Rousillon v Rousillon* (1880) 14 ChD 351, where 'the champagne trade' was construed to mean the importing and exporting of wines from Champagne and not necessarily to include also the making of wine in Champagne; *Hayne v Burchell* (1890) 35 Sol Jo 88, CA, where 'client' was construed as client during term of articles, 'business' was construed as business of a solicitor and 'being a client' construed as being a person habitually employing the solicitor; *Mills v Dunham* [1891] 1 Ch 576, CA, where 'transact business' was held to refer to business similar to that of the covenantee; *Moenich v Fenestre* (1892) 67 LT 602, CA, where 'any trade or business' was held to mean any trade or business of a commission merchant and 'at any time previously' was held to refer only to the term at the covenantor's employment; *Dubowski & Sons v Goldstein* [1896] 1 QB 478, CA, where 'the said business' was construed as the business then carried on at a certain place; *Haynes v Doman* [1899] 2 Ch 13, CA, where a covenant not to engage in the plaintiff's business with a limited class of people mentioned in the agreement was held reasonable; *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169, where 'business' was held to mean business of the same nature as that in which the covenantor was employed; *Barr v Craven* (1903) 89 LT 574, CA, where 'the business' was construed as the business of the agency in the locality worked by the covenantor, an insurance agent; *Reeve v Marsh* (1906) 23 TLR 24, where a covenant not to affect or interfere with or prejudice a business was held not to prohibit the setting up of a rival business; *Lewis and Lewis v Durnford* (1907) 24 TLR 64, where a covenant not to act as a solicitor for any person who is or has within the previous five years been a client of the covenantees was held to refer to clients at the time of termination of the service or within five years before; *Mouchel v Cubitt & Co* (1907) 24 RPC 194, where 'at any time' was held to be limited to the period of a licence (see also *Bescot (Electric) Ltd v Merlin Mouldings Ltd* (1952) 69 RPC 297; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 511); *Cattermoul v Jared* (1909) 53 Sol Jo 244, where 'house' was construed as public house; *Gaumont-British Picture Corp Ltd v Alexander* [1936] 2 All ER 1686, where a clause general in terms was held to be limited to the period of service; *CW Plowman & Son Ltd v Ash* [1964] 2 All ER 10, [1964] 1 WLR 568, CA (covenant confined to non-solicitation in respect of goods which were the subject of the defendant's employment); *Home Counties Dairies Ltd v Skilton* [1970] 1 All ER 1227, [1970] 1 WLR 526, CA (covenant confined to employment of a milk roundsman by dairymen); *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, [1977] 1 WLR 1472, CA, where a covenant not to enter into a contract of service with a rival organisation carrying on various businesses in many countries was construed as limited to the organisation's mail order business carried on in the United Kingdom; *Business Seating (Renovations) Ltd v Broad* [1989] ICR 729; *Clarke v Newland* [1991] 1 All ER 397, CA. See also *Putsman v Taylor* [1927] 1 KB 637 at 647, DC, per Talbot J (on appeal [1927] 1 KB 741, CA); and cf *Kimberley v Jennings* (1836) 6 Sim 340; *Southland Frozen Meat and Produce Export Co Ltd v Nelson Bros Ltd* [1898] AC 442, PC. As to the extent to which a proviso against the covenantee's unreasonably withholding consent will validate an otherwise over-wide restriction see *Chafer Ltd v Lilley* [1947] LJR 231; and cf *Perls v Saalfeld* [1892] 2 Ch 149, CA; *Kerchiss v Colara Printing Inks Ltd* [1960] RPC 235.

4 *Konski v Peet Ltd* [1915] 1 Ch 530 at 538 per Neville J, where the court refused to construe a covenant against soliciting customers generally as a covenant against soliciting customers during the covenantor's employment. See also *Mumford v Gething* (1859) 7 CBNS 305, where the court refused to limit a restraint in general terms to the term of the covenantor's service; *Baker v Hedgecock* (1888) 39 ChD 520, where the court

declined to put a limited meaning on 'any business whatsoever'; *Ehrman v Bartholomew* [1898] 1 Ch 671, where prohibition against acting in any other business during the period of employment, namely ten years, was held bad; *Marshall's Ltd v Leek* (1900) 17 TLR 26, where the court refused to limit a restraint in general terms to the period of the covenantor's service; *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 at 310, where a restraint as to sale of india-rubber goods was held not too wide for tyre manufacturers; *SV Nevanas & Co Ltd v Walker and Foreman* [1914] 1 Ch 413, where the court refused to construe a restraint from importing meat in general terms as a restraint from importing meat from Australia, the trade to be protected; *Eastes v Russ* [1914] 1 Ch 468, CA, where the court refused to limit a general restraint from engaging in similar work to the period of covenantor's service; *Vandervell Products Ltd v McLeod* [1957] RPC 185, CA, where the court declined to construe 'competitors', as limited to competitors in the line of business covered by trade secrets. See also *Commercial Plastics Ltd v Vincent* [1965] 1 QB 623, [1964] 3 All ER 546, CA; and cf *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 742, HL, per Lord Shaw of Dunfermline; *JA Mont (UK) Ltd v Mills* [1993] IRLR 172, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/A. IN GENERAL/422. Ordinary meaning of words.

#### 422. Ordinary meaning of words.

Words must be construed in their ordinary business meaning<sup>1</sup>. The ordinary rules for the construction of contracts<sup>2</sup> apply in determining, for instance, whether a covenant in restraint of trade is joint or joint and several<sup>3</sup>, whether a minor is or is not bound<sup>4</sup>, whether oral evidence may be admitted to prove that a term has a secondary meaning<sup>5</sup>, whether the contract may be rescinded or rectified<sup>6</sup>, or whether the agreement is harsh and unconscionable<sup>7</sup>.

<sup>1</sup> *William Cory & Son Ltd v Harrison* [1906] AC 274, HL. As to the meaning of 'London' see *Sutcliffe and Bingham Ltd v Holwill* (1912) 134 LT Jo 156; *Provident Clothing and Supply Co Ltd v Mason* [1913] 1 KB 65 at 75, CA, per Buckley LJ (revsd sub nom *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL, but apparently without affecting this point); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq.

<sup>2</sup> As to the construction of contracts generally see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 164 et seq.

<sup>3</sup> *Palmer v Mallet* (1887) 36 ChD 411, CA; and see **CONTRACT** vol 9(1) (Reissue) PARA 1083.

<sup>4</sup> See PARA 418; **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 12; and **EMPLOYMENT** vol 39 (2009) PARA 16.

<sup>5</sup> *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85, CA; and see PARA 391 text and notes 2-3; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 185 et seq.

<sup>6</sup> *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85, CA. See **MISREPRESENTATION AND FRAUD** vol 31 (2003 Reissue) PARA 814 et seq; **MISTAKE** vol 77 (2010) PARA 57 et seq.

<sup>7</sup> *Middleton v Brown* (1878) 47 LJCh 411, CA; cf *Kimberley v Jennings* (1836) 6 Sim 340; *Croft v Haw* (1836) 5 LJCh 305. Mere inadequacy of consideration is, however, no objection: see PARA 415. As to oppressiveness of contract see further **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 863 et seq.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/A. IN GENERAL/423. Certainty.



### 423. Certainty.

The agreement in restraint of trade must not be too vague<sup>1</sup>, and the parties cannot leave it to the court to frame their agreement to meet a particular breach<sup>2</sup>.

1 *Catt v Tourle* (1869) 4 Ch App 654, where a tied house covenant in a brewer's lease was not void for uncertainty; *Stride v Martin* (1897) 77 LT 600, DC, where a covenant was taken on the sale of a milk business and it was held that 'in the neighbourhood' meant in the immediate neighbourhood, where there could be competition, and the covenant was not too vague; *Marshall's Ltd v Leek* (1900) 17 TLR 26, where the covenant was not to enter into business competition either for himself or as manager or assistant, and it was held not too vague; *Barr v Craven* (1903) 89 LT 574, CA, where a covenant by an insurance agent 'not to interfere directly or indirectly with any of the business' was held limited to business in a particular locality, and the injunction was limited to procuring transfers from the covenantees to a rival society of policies which were in the agent's books during his employment; *Connors Bros Ltd v Connors* [1940] 4 All ER 179 at 189, PC, where 'directly or indirectly engaged in the sardine business' was held not too vague; *Beetham v Fraser* (1904) 21 TLR 8, DC, where a covenant not to enter into any business arrangement in competition that would in any way interfere with the business of the covenantee was held too vague (although apparently similar words may be operative in modifying a covenant otherwise too wide: *Leather Cloth Co v Lorscheid* (1869) LR 9 Eq 345 at 355); *Reeve v Marsh* (1906) 23 TLR 24, where a covenant not to 'interfere with, prejudice or in any manner affect' a business was regarded as too vague, although the case was decided on the ground that it did not forbid the setting up of a rival business; *Coleborne v Kearns* (1912) 46 ILT 305, CA, where the words 'should we leave your employment' were considered too vague; and cf *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* (1892) as reported in 67 LT 469 at 471, where a covenant to give the exclusive benefit of all new inventions and improvements and to communicate all such innovations was held not too vague; *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL; see **CONTRACT** vol 9(1) (Reissue) PARA 672; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 208-209, 214-216.

2 A covenant to retire from a trade 'so far as the law allows' is void: *Davies v Davies* (1887) 36 ChD 359, CA; see **CONTRACT** vol 9(1) (Reissue) PARA 672.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/A. IN GENERAL/424. Covenants in restraint not 'usual covenants'.

### 424. Covenants in restraint not 'usual covenants'.

Covenants in restraint of trade in a lease of premises in a trading locality are not 'usual covenants'<sup>1</sup>, and a covenant on the sale of a business restricting the vendor from carrying on a like business is not mere common form, and a demand for such a covenant amounts to a reopening of negotiations<sup>2</sup>.

1 *Proper v Parker* (1832) 3 My & K 280; see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 83.

2 *Bristol, Cardiff and Swansea Aerated Bread Co v Maggs* (1890) 44 ChD 616.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/A. IN GENERAL/425. Waiver and release.

### 425. Waiver and release.

It is no breach of a covenant in restraint of trade if the act complained of is done with the assent and for the benefit of the assignee<sup>1</sup>.

A consent given on one occasion to the covenantor's engaging in the trade is not a release of the covenant for the future<sup>2</sup>.

1 *Rawlinson v Clarke* (1845) 14 M & W 187. See also *Maythorn v Palmer* (1864) 11 LT 261.

2 *Showell v Winkup* (1889) 60 LT 389, where a covenant by a brewer's traveller, limited as to area and time, was not released by an agreement by the covenantees that the covenantor should be employed by a company to which they sold their business. As to waiver and release generally see **CONTRACT** vol 9(1) (Reissue) PARAS 1025-1029 (waiver), 1052-1054 (release).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/B. PARTICULAR CASES/426. Meaning of 'similar business'.

## **B. PARTICULAR CASES**

### **426. Meaning of 'similar business'.**

In deciding whether a person is engaged in a business similar to another business, the test is whether his business is so like the other as seriously to compete with it<sup>1</sup>.

1 *Drew v Guy* [1894] 3 Ch 25, CA, where in relation to a covenant in a lease, the supply of chops, steaks etc was held to be similar to the supply of hot meals and alcoholic drinks; *Castelli v Middleton* (1901) 17 TLR 373, where the covenant not to compete was given by the vendor of a business of manufacturing annatto (a vegetable colouring matter) and food preservatives, who then engaged in a business mainly concerned in manufacturing dairy utensils, but also to a limited extent in selling by retail annatto and food preservatives, chiefly bought wholesale from the covenantee, and was held to be engaged in a competing business; *Automobile Carriage Builders Ltd v Sayers* (1909) 101 LT 419. See *Provident Clothing and Supply Co Ltd v Mason* [1913] 1 KB 65 at 70-71, CA, per Vaughan Williams LJ (revsd, but not on this point, sub nom *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL); and *Vandervell Products Ltd v McLeod* [1957] RPC 185, CA (meaning of 'competitors').

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/B. PARTICULAR CASES/427. Directors, managers and creditors as persons carrying on or interested in a business.

### **427. Directors, managers and creditors as persons carrying on or interested in a business.**

A person who is a director of a company carrying on a business carries on or is engaged, concerned or interested in that business<sup>1</sup>.

A person who is engaged as an assistant or manager at a fixed salary not depending on profits or gross returns is not 'directly or indirectly interested' in the business<sup>2</sup> since an 'interest' means a proprietary or pecuniary interest<sup>3</sup>, although it does not include a person who is merely

a creditor of a person who carries on the business<sup>4</sup>; nor is such an assistant or manager thereby 'exercising or carrying on' a business<sup>5</sup>, but he is 'engaged' or 'concerned' in it<sup>6</sup>.

1 *Castelli v Middleton* (1901) 17 TLR 373. As to the meaning of 'carry on business' see generally PARAS 370-372.

2 *Gophir Diamond Co v Wood* [1902] 1 Ch 950, applying *Smith v Hancock* [1894] 2 Ch 377, CA. Cf *Newling v Dobell* (1868) 38 LJCh 111 at 112 per Malins V-C.

3 *Smith v Hancock* [1894] 2 Ch 377 at 386, 390, CA; *Gophir Diamond Co v Wood* [1902] 1 Ch 950. Cf *George Hill & Co v Hill* (1886) 35 WR 137, where it was held that 'interested' means entitled to profits, and 'concerned' means having something to do with it. See also *Batts Combe Quarry Ltd v Ford* [1943] Ch 51, [1942] 2 All ER 639, CA; and note 4.

4 *William Cory & Son Ltd v Harrison* [1906] AC 274, HL. Cf *Bird v Lake* (1863) 1 Hem & M 111, 338; *Smith v Hancock* [1894] 2 Ch 377, CA (see earlier proceedings [1894] 1 Ch 209 at 217 per Kekewich J); *Southland Frozen Meat and Produce Export Co Ltd v Nelson Bros Ltd* [1898] AC 442 at 446, PC. However, a person who lends money on the terms of receiving as interest a share of the profits of a business is 'directly or indirectly engaged' in that business (*Cooper v Page* (1876) 34 LT 90), and a person who provides the capital free of charge 'assists in carrying on' or is 'concerned with' the business (*Batts Combe Quarry Ltd v Ford* [1943] Ch 51, [1942] 2 All ER 639, CA, where 'employed' was held to cover negotiating for initial equipment).

5 *Clark v Watkins* (1863) 11 WR 319, where a chemist's assistant covenanted not to carry on the business 'in his own name or for his own benefit or in the name or names or for the benefit of any person or persons in D', and it was held no breach to act as an employee and to take orders within the area for persons carrying on business outside the area; *Allen v Taylor* (1870) 18 WR 888 (on appeal 19 WR 35 at 36 per Lord Hatherley LC), where on the sale of the business of a rag merchant the covenant was not to 'exercise or carry on the trade . . . either in his own name or that of any other person'; *Graham v Lewis* (1888) 22 QBD 1, CA, where it was held that a solicitor's clerk did not 'carry on business' in the City of London for the purpose of jurisdiction of the former Mayor's Court. As to the meaning of 'carry on business' in relation to bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 125.

6 *Rolfe v Rolfe* (1846) 15 Sim 88 at 90, where on the dissolution of a tailor's partnership the covenant was not to engage in tailoring, either alone or with any other person, and it was held to be a breach to act as foreman to a tailor; *Newling v Dobell* (1868) 19 LT 408, where on the sale of a tailor's business the covenant was not to carry on or be concerned or interested in a tailoring business, and it was held to be a breach when the covenantor took employment as a journeyman with a nephew; *Jones v Heavens* (1877) 4 ChD 636, where the covenant was not to carry on or be concerned in carrying on the business of a saddler, or to sell goods in any way connected with that trade, and it was held to be a breach to act as a journeyman; *Baxter v Lewis* (1886) 30 Sol Jo 705, 754, where a covenant, given on the sale of a tobacconist's business, not to carry on or be concerned directly or indirectly with such a business was held breached when the covenantor first became manager for a company, and then a shopman, there being a strong suspicion of bad faith; *George Hill & Co v Hill* (1886) 35 WR 137, where on the sale of a butcher's business a covenant not to 'engage in or be in any way concerned or interested in' any similar business was held to be breached by employment in the business; *Watts v Smith* (1890) 62 LT 453, where a covenant by a draper's assistant not to engage in a similar business was breached by becoming an assistant at a salary; *Cade v Calfe* (1906) 22 TLR 243, where a covenant not to be 'directly or indirectly engaged, concerned or interested' was held breached by entering into the service of another; *Cavendish v Tarry* (1908) 52 Sol Jo 726, where a covenant not to be 'concerned or interested' was broken by becoming a weekly servant; *Pearks Ltd v Cullen* (1912) 28 TLR 371, where a covenant not to be engaged in business was held broken by being employed as an assistant; but the whole covenant was held bad. However, in *Ramoneur Co Ltd v Brixey* (1911) 104 LT 809, DC, a covenant by a chimney sweep not to undertake any work or orders of any kind except for the covenantees, or to carry on or be concerned in the business either by himself or in conjunction with any person, was held not to apply to employment as a servant. Cf *Dales v Weaber* (1870) 18 WR 993, where 'with the assistance of any other person' was held to mean as assistant of any other person where the covenantor had set up a business in the area of restraint, and then sold that business to another person and became his manager. In *Lievre v Mayonnet* (1913) 2 LJCCR 4 it was held that 'not to teach or give instructions nor advertise himself as a teacher of any language' did not mean set up for himself only; to enter the service of another was a breach.

#### 428. Person practising as solicitor or surgeon.

A solicitor acting as managing clerk at a fixed salary to another solicitor is not practising as a solicitor<sup>1</sup>, although a person acting as assistant to a surgeon may be carrying on the profession of a surgeon<sup>2</sup>.

<sup>1</sup> *Way v Bishop* [1928] Ch 647, CA, distinguishing *Palmer v Mallet* (1887) 36 ChD 411, CA, and criticising *Robertson v Willmott* (1909) 25 TLR 681. See further PARA 432 note 67.

<sup>2</sup> *Palmer v Mallet* (1887) 36 ChD 411, CA, distinguishing *Allen v Taylor* (1871) 19 WR 556. See further PARA 432 note 27.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/B. PARTICULAR CASES/429. Business carried on by husband or wife.

#### 429. Business carried on by husband or wife.

A man does not carry on and is not interested in a business which is carried on in good faith by, and belongs to, his wife<sup>1</sup>, nor is a woman interested or concerned in a business by marrying a man who carries it on and assisting him in it<sup>2</sup>.

<sup>1</sup> *Smith v Hancock* [1894] 2 Ch 377, CA (even though he helps her by writing a circular inviting 'old friends' to be customers, and by introducing her to dealers, and in other ways). Apparently, he is not 'interested' by merely taking a friendly interest in forwarding a business set up by a stranger (see *Smith v Hancock* at 391 per AL Smith LJ); but apparently, it is not unreasonable to require a covenantor 'not to induce or assist any other person to commence the business' (*Lyddon v Thomas* (1901) 17 TLR 450, where such a covenant, inter alia, was held reasonable).

<sup>2</sup> *Loe v Lardner* (1856) 4 WR 597 (licensed house).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/B. PARTICULAR CASES/430. Business falling within particular description.

#### 430. Business falling within particular description.

Where the question is whether the covenantor is carrying on a certain specified trade or business, the words describing the trade or business must be taken in their ordinary business meaning subject to the general rules applicable as to the admission of evidence of a secondary meaning<sup>1</sup>.

Although the subject matter may be the same, the business of a merchant or dealer is distinct from that of a manufacturer<sup>2</sup> and the business of a stockbroker from that of a stockdealer<sup>3</sup>, but the selling of goods wholesale is not a business distinct from the selling of the same goods retail<sup>4</sup>.

1 *May v O'Neill* (1875) 44 LJCh 660, where it was held that the business of a solicitor includes practice in every court in which a solicitor may appear, including a court in which he has to enter his name specially on a roll before practising; *McFarlane v Hilton* [1899] 1 Ch 884, where a covenant not to publish a sporting paper was not broken by publication of a paper recording amateur sports, but with no racing intelligence or betting odds. As to the meaning of a covenant by a retiring partner not to attend as a dentist any patients of the remaining partners see *Harris v Mansbridge* (1900) 17 TLR 21. See also *Bowler v Lovegrove* [1921] 1 Ch 642, where it was held that the defendant by carrying on the business of an estate agent committed no breach of a covenant not to carry on the business of auctioneers and estate agents. As to the sale of liquor see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 505. As to the general rules for the admission of evidence of a secondary meaning see **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 198 et seq.

2 *Josselyn v Parson* (1872) LR 7 Exch 127, where a covenant not to travel for any porter, ale or spirit merchant was held not to be breached by travelling for a brewer, for a merchant is one who buys and sells, not one who sells his own manufactures; *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85, CA, deciding that 'provision merchant' includes a margarine dealer, but not a margarine manufacturer, even though he sells his products within the area of restraint. See also *Automobile Carriage Builders Ltd v Sayers* (1909) 101 LT 419, where a covenant with motor carriage builders not to carry on or be engaged in any business 'similar to or including the business' of the covenantees was held to be broken by selling motor carriages, although the covenantor contended that he did not manufacture, but he had held himself out as a manufacturer; but cf *Harms v Parsons* (1862) 32 Beav 328, where a covenant not to carry on the trade of a horsehair manufacturer was held to cover buying and selling manufactured horsehair; *Castelli v Middleton* (1901) 17 TLR 373; and PARA 369 note 3.

3 The proposition was admitted without argument in *Lyddon v Thomas* (1901) 17 TLR 450.

4 *Rogers v Maddocks* [1892] 3 Ch 346, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/B. PARTICULAR CASES/431. Carrying on business within prohibited area.

#### **431. Carrying on business within prohibited area.**

A solicitor does not carry on business in an area by writing from outside the area to persons, and on behalf of persons, within it<sup>1</sup>, although he carries on business or practises within an area if he appears regularly at courts in the area<sup>2</sup>. Nor does he 'take away clients' from another solicitor if he acts for persons who have been clients of the other but have left him<sup>3</sup>.

A doctor who attends a few patients at their own request within the area of restraint, but has no residence or premises there, does not 'set up in practice' there, but he does 'practise' there<sup>4</sup>, and it seems that a trader who applies for orders or supplies goods within an area carries on business there, even though he has no premises there<sup>5</sup>.

An estate agent who advertises houses within the area of restraint and puts up his boards on them carries on the business of an estate agent within the area<sup>6</sup>.

A person does not carry on, and is not interested or concerned in, a business within an area by merely acting, outside the area, for a person carrying on business within it<sup>7</sup>; but a newspaper is published within an area, if substantial numbers are distributed from an office in that area, even though the chief place of printing and publishing is outside the area<sup>8</sup>.

1 *Woodbridge & Sons v Bellamy* [1911] 1 Ch 326 at 336, CA, per Cozens-Hardy MR; see further at 338 per Fletcher Moulton LJ ('carry on business' refers to that which a solicitor does at his place of business), distinguishing *Edmundson v Render* [1905] 2 Ch 320, where the covenant was not to do within the area any work or act usually done by solicitors, and where it was held by Buckley J a breach for the covenantor, instructed outside the area, to send a solicitor's letter to a person within the area; a demand made, or advice given, by letter is an act done at the address of the addressee, and the post office is the agent of the sender. See also *Edmundson v Render* (1904) 90 LT 814, where the covenant was the same as above, but different breaches were alleged and where it was held by Kekewich J as follows: to obtain probate of the will of a person

who died within the area is apparently a breach; to correspond with a witness within the area for the purpose of obtaining probate of a will of a person who died without the area is apparently not a breach; to advertise the letting of a farm within the area in a paper published outside, but circulating within, the area, is not a breach; to take proceedings in a county court within the area, although without attending there either in person or by a clerk, is a breach, for the district judge is the agent of the claimant's solicitor for the purpose; to attend at the execution of a will within the area is a breach unless, apparently, done as a friendly act without fee; but it is no breach to prepare a will for a person within the area on instructions received outside the area, and to send it for execution within the area. Cf *Freeman v Fox* (1911) 55 Sol Jo 650, where a covenant not to practise or act as a solicitor was held not to be broken by doing one act of a solicitor and writing several letters to persons within the area.

2 *Llewellyn v Simpson* (1891) 91 LT Jo 9.

3 *Hayne v Burchell* (1890) 35 Sol Jo 88, CA. Where solicitors in partnership agree that on dissolution neither is to do business with 'original clients' of the other, 'original clients' comprise those who were clients of either before the partnership and those who during the partnership were by arrangement particularly the clients of either: *Badham v Williams* (1900) 83 LT 141.

4 *Robertson v Buchanan* (1904) 73 LJCh 408, CA. However, apparently, it would be 'setting up in practice' to drive regularly round the area (*Robertson v Buchanan* at 410 per Vaughan Williams LJ), or to attend a large number of patients at their invitation (at 411 per Stirling LJ). In *Rogers v Drury* (1887) 57 LJCh 504, a doctor who had covenanted not to practise or reside in the area or otherwise directly or indirectly to enter into competition with the purchaser of his practice was held to have committed a breach by attending patients who summoned him and stated that in no event would they have called in the purchaser; but a dentist retiring from partnership who covenants not to attend any patients of the other partners may attend such persons as during the partnership were particularly his patients (*Harris v Mansbridge* (1900) 17 TLR 21), and, apparently, a dentist who by his articles of partnership is on dissolution in certain circumstances expressly entitled to practise may attend patients of the old firm, but it is uncertain whether he may solicit such patients (*Clifford v Phillips* (1907) 51 Sol Jo 748). Cf **PARTNERSHIP** vol 79 (2008) PARA 213 et seq.

5 *Turner v Evans* (1852) 2 De GM & G 740, where on the sale of a wine merchant's business the vendor covenanted never 'by himself, his partner or agent, or otherwise howsoever, either directly or indirectly' to 'set up, embark in, or carry on' the business; *Brampton v Beddoes* (1863) 13 CBNS 538, where a covenant given on the sale of a drapery business not to carry on or assist in carrying on such a business was held breached by supplying customers within the area from a place beyond it. Apparently a stockbroker who has covenanted not to carry on business within an area may start an office outside the area and deal with clients within it, but not tout for clients within the area: *Lyddon v Thomas* (1901) 17 TLR 450 per Farwell J.

6 *Hadsley v Dayer-Smith* [1914] AC 979 at 984, HL, per Lord Shaw of Dunfermline.

7 *Fairbrother v England* (1891) 40 WR 220, where in respect of a covenant given on the dissolution of an auctioneers' and estate agents' partnership not to carry on 'directly or indirectly on his own account or as agent or assistant of or in partnership with, any other person', or to be 'interested or concerned', it was no breach to advertise outside the area houses within the area on behalf of a person carrying on business within the area.

8 *McFarlane v Hulton* [1899] 1 Ch 884.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(viii) Form, Construction and Certainty/B. PARTICULAR CASES/432. Instances of covenants affecting particular trades, businesses and professions.

#### **432. Instances of covenants affecting particular trades, businesses and professions.**

Restrictive covenants have been considered by the courts in relation, inter alia, to the following trades, businesses and professions: accountant<sup>1</sup>, actor<sup>2</sup>, advertising agency<sup>3</sup>, agent and commercial traveller<sup>4</sup>, architect and surveyor<sup>5</sup>, auctioneer and estate agent<sup>6</sup>, author<sup>7</sup>, baker<sup>8</sup>, bank manager and clerk<sup>9</sup>, barrister practising in place where the professions of barrister and solicitor are fused<sup>10</sup>, bill-poster<sup>11</sup>, bookmaker<sup>12</sup>, boxer<sup>13</sup>, brass-founder<sup>14</sup>, brewer<sup>15</sup>, butcher<sup>16</sup>, car

salesman<sup>17</sup>, carrier<sup>18</sup>, cashier<sup>19</sup>, cheesemonger<sup>20</sup>, chemist<sup>21</sup>, chimney-sweep<sup>22</sup>, dairyman and milk seller<sup>23</sup>, dancer<sup>24</sup>, debt collector<sup>25</sup>, dentist<sup>26</sup>, doctor and surgeon<sup>27</sup>, draper and hosier<sup>28</sup>, dry cleaner<sup>29</sup>, dyer<sup>30</sup>, employment agency<sup>31</sup>, financial services<sup>32</sup>, film actor<sup>33</sup>, fishmonger<sup>34</sup>, garage proprietor<sup>35</sup>, glass maker<sup>36</sup>, glove maker<sup>37</sup>, greengrocer and fruiterer<sup>38</sup>, grocer<sup>39</sup>, hairdresser<sup>40</sup>, insurance company<sup>41</sup>, jeweller<sup>42</sup>, laboratory assistant<sup>43</sup>, mail order business<sup>44</sup>, manufacturer<sup>45</sup>, merchant and dealer<sup>46</sup>, milliner<sup>47</sup>, motor coach proprietor<sup>48</sup>, music hall artiste<sup>49</sup>, newspaper proprietor, reporter or employee<sup>50</sup>, newspaper seller<sup>51</sup>, oil and colourman<sup>52</sup>, opera singer<sup>53</sup>, optician<sup>54</sup>, patent agent<sup>55</sup>, patentee<sup>56</sup>, perfumer<sup>57</sup>, petrol filling station owner<sup>58</sup>, photographer<sup>59</sup>, publican<sup>60</sup>, publisher<sup>61</sup>, restaurant keeper<sup>62</sup>, retail dealer<sup>63</sup>, rope maker<sup>64</sup>, saddler<sup>65</sup>, schoolmaster and teacher<sup>66</sup>, solicitor<sup>67</sup>, song writer<sup>68</sup>, stage coach proprietor<sup>69</sup>, stevedore<sup>70</sup>, stockbroker<sup>71</sup>, tailor<sup>72</sup>, tally-man<sup>73</sup>, tobacconist<sup>74</sup>, trade protection society or association<sup>75</sup>, undertaker<sup>76</sup> and waiter<sup>77</sup>.

1 *Brown v Harper* (1893) 68 LT 488 (clients during the term of service; no time limit; covenantor a minor; good); *Isitt and Jenks v Ganson* (1899) 107 LT Jo 423 (England; seven years; good); cf *D Bates & Co v Dale* [1937] 3 All ER 650 (15 miles; 15 years; bad).

2 *Lumley v Wagner* (1852) 1 De GM & G 604; and see **LICENSING AND GAMBLING** vol 67 (2008) PARA 237.

3 *Rex Stewart Jeffries Parker Ginsberg Ltd v Parker* [1988] IRLR 483, CA.

4 *Homer v Ashford and Ainsworth* (1825) 3 Bing 322 (stated towns; 14 years; question of consideration); *Kimberley v Jennings* (1836) 6 Sim 340 (restraint during term of service); *Mumford v Gething* (1859) 7 CBNS 305 (travelling for rival over same ground; no time limit; good); *King v Hansell* (1860) 5 H & N 106 (term of service); *Josselyn v Parson* (1872) LR 7 Exch 127 (25 miles; 12 months; question of breach only); *Allsopp v Wheatcroft* (1872) LR 15 Eq 59 (no limit of space; two years; bad); *Middleton v Brown* (1878) 47 LJCh 411, CA (8 miles; 12 months; good); *Rousillon v Rousillon* (1880) 14 ChD 351 (see note 46); *Parsons v Cotterill* (1887) 56 LT 839 (see note 46); *Showell v Winkup* (1889) 60 LT 389 (20 miles; two years; good); *Mills v Dunham* [1891] 1 Ch 576, CA (customers during term of service; good); *Moenich v Fenestre* (1892) 67 LT 602, CA (competing business in United Kingdom; five years; good); *Perls v Saalfeld* [1892] 2 Ch 149, CA (15 miles; three years; bad as applying to all businesses whatever); *Rogers v Maddocks* [1892] 3 Ch 346, CA (100 miles; two years; good, but part severable); *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447 (no limit of space; three years; good); *General Accident Assurance Corp v Noel* [1902] 1 KB 377 (50 miles; one year; good; question of election between damages and injunction); *Barr v Craven* (1903) 89 LT 574, CA (district in which agent had acted; no time limit; good); *Henry Leetham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322, CA (United Kingdom and Ireland; five years; bad; question as to restraint in gross; see PARA 389); *Morris & Co v Ryle* (1910) 103 LT 545, CA (sale of any goods whatever to, or any dealings with, persons whom covenantor called on during term of service; five years; bad); *Stuart and Simpson v Halstead* (1911) 55 Sol Jo 598 (United Kingdom; no time limit; bad); *Sutcliffe and Bingham Ltd v Holwill* (1912) 134 LT Jo 156 (districts in which covenantor travelled for covenantees; 12 months; good; meaning of 'London'); *Coleborne v Kearns* (1912) 46 ILT 305, CA (meaning of 'leave employment'); *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL (25 miles of London where the covenantees carry on business; three years; bad); *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 (United Kingdom, Germany or France; one year; 'india-rubber goods whether wholesale or retail'; good as to United Kingdom; Germany and France severable); *Chafer Ltd v Lilley* [1947] LJR 231 (business in Wisbech district; throughout United Kingdom; area too wide); *M & S Drapers (a firm) v Reynolds* [1956] 3 All ER 814, [1957] 1 WLR 9, CA (five years; bad); *GW Plowman & Son Ltd v Ash* [1964] 2 All ER 10, [1964] 1 WLR 568, CA (customers during term of service; two years; good; it was not an objection that the covenant might cover persons who had ceased to be customers before end of period of service); *Gledhow Autoparts Ltd v Delaney* [1965] 3 All ER 288, [1965] 1 WLR 1366, CA (area restraint; three years; the restraint covered many garages which never became customers of the employer and on which the traveller might never have called; bad); *T Lucas & Co Ltd v Mitchell* [1972] 2 All ER 1035, [1972] 1 WLR 938 (area restraint; bad since the covenant against soliciting or supplying to customers would have adequately protected the employer's trade connection) (revsd [1974] Ch 129, [1972] 3 All ER 689, CA, on the ground that the area restraint was severable); *Spafax (1965) Ltd v Dommett* (1972) 116 Sol Jo 711, CA (see PARA 407 note 1); cf *Cussen v O'Connor* (1893) 32 LR Ir 330 (similar business in counties travelled by covenantor for covenantee; 12 years, or two years from determination of engagement; good, but injunction limited to two years from determination of engagement).

5 *Robertson v Willmott* (1909) 25 TLR 681 (10 miles; five years; good; question of breach only); *Gadd v Thompson* [1911] 1 KB 304, DC (10 miles; ten years; covenantor a minor; good).

6 *Fairbrother v England* (1891) 40 WR 220 (2 miles; three years; apparently good, but no breach); *Hadsley v Dayer-Smith* [1914] AC 979, HL (1 mile; ten years; apparently good; question of breach); *Bowler v Lovegrove* [1921] 1 Ch 642 (1 year; district of employment; bad but no breach); *Scorer v Seymour-Johns* [1966] 3 All ER

347, [1966] 1 WLR 1419, CA (5 miles; three years; good); *Calvert, Hunt and Barden v Elton* (1974) 233 Estates Gazette 391 (3 miles; three years; good).

7 *Morris v Colman* (1812) 18 Ves 437 (covenant in partnership articles not to write for any but covenantee's theatre; good); and see **PRESS, PRINTING AND PUBLISHING** vol 36(2) (Reissue) PARA 401.

8 *Mitchel v Reynolds* (1711) 1 P Wms 181 (particular parish; five years (term of lease); good); *Rannie v Irvine* (1844) 7 Man & G 969 (1 mile; term of lease; good; also, customers then dealing at the premises; same time; good); *Clark v Howard* (1860) 2 F & F 125 (limit as to any new baking business in certain town; no time limit; good; question of breach only); *Toby v Major* (1899) 43 Sol Jo 778 (3 miles; no time limit; apparently bad); *Bromley v Smith* [1909] 2 KB 235 (10 miles; three years; good).

9 *London and Yorkshire Bank Ltd v Pritt* (1887) 56 LJCh 987 (5 miles; 12 months; good); *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA (2 miles; two years; good); *Spence v Mercantile Bank of India Ltd* (1921) 37 TLR 390 (on appeal 37 TLR 745, CA) ('no eastern bank'; no time limit; bad).

10 *Home v Douglas* (1912) Times, 15 November.

11 *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL (50 miles; two years; apparently good, but the question discussed related to the determination of whole contract by wrongful dismissal; see PARA 436).

12 *SW Strange Ltd v Mann* [1965] 1 All ER 1069, [1965] 1 WLR 629 (manager of credit betting business; Cheltenham and any place within 12 miles; three years; area restriction inappropriate in the particular circumstances).

13 *Watson v Prager* [1991] 3 All ER 487, [1991] 1 WLR 726.

14 *Young v Timmins* (1831) 1 Cr & J 331 (question of consideration).

15 *Hinde v Gray* (1840) 1 Man & G 195 (no limit of space; ten years; bad); *Allsopp v Wheatcroft* (1872) LR 15 Eq 59; *Showell v Winkup* (1889) 60 LT 389; *Rogers v Maddocks* [1892] 3 Ch 346, CA; *Vancouver Malt and Sake Brewing Co Ltd v Vancouver Breweries Ltd* [1934] AC 181, PC (world-wide; 15 years; bad; restraint in gross).

16 *Elves v Crofts* (1850) 10 CB 241 (5 miles; no time limit; good); *George Hill & Co v Hill* (1886) 35 WR 137 (10 miles; so long as covenantee should carry on the business; good; question of breach only); *Cooper v Southgate* (1894) 10 R 552, DC (1 mile; no time limit; apparently good, but question of consideration only); *Empire Meat Co Ltd v Patrick* [1939] 2 All ER 85, CA (5 miles; five years; some area agreement justifiable but distance too great).

17 *Vincent's of Reading v Fogden* (1932) 48 TLR 613 (15 miles; three years; bad).

18 *Archer v Marsh* (1837) 6 Ad & El 959 (not to compete; no time limit; good, but question of consideration only); *Wallis v Day* (1837) 2 M & W 273 (unlimited as to space and time, but limited as to capacity in which covenantor might trade; good); *Davies, Turner & Co v Lowen* (1891) 64 LT 655 (London and other places, and within 50 miles of each; good as to London, bad as to place where covenantee had no business; bad also as to 'business to be hereafter carried on'); *Macfarlane v Dumbarton Steamboat Co* (1899) 36 SLR 771 (United Kingdom; ten years; bad; canvassing customers of business sold; injunction granted).

19 *Great Western and Metropolitan Dairies Ltd v Gibbs* (1918) 34 TLR 344 (20 miles; one year; assist in any capacity; bad; also description of business too wide).

20 *Woods v Dennett* (1817) 2 Stark 89 (1 mile; no time limit; good, but question of measurement only) (overruled by *Moufflet v Cole* (1872) LR 8 Exch 32, Ex Ch); *Harrison v Gardner* (1817) 2 Madd 198 (injunction granted on ground of fraud; no written agreement).

21 *Hitchcock v Coker* (1837) 6 Ad & El 438, Ex Ch (3 miles; no time limit; good); *Clark v Watkins* (1863) 11 WR 319 (7 miles; so long as covenantee had any interest in the business; good, but question of breach only); *Marshall's Ltd v Leek* (1900) 17 TLR 26 (not to enter into competition; no time limit; good).

22 *Ramoneur Co Ltd v Brixey* (1911) 104 LT 809, DC (3 miles; no time limit; question of breach only).

23 *Proctor v Sargent* (1840) 2 Man & G 20 (5 miles; two years; good); *Benwell v Inns* (1857) 24 Beav 307 (3 miles; two years; good); *Cornwall v Hawkins* (1872) 41 LJCh 435 (2 miles; two years; covenantor a minor; good); *Baines v Geary* (1887) 35 ChD 154 (customers during term of service; no time limit; good); *Short Horn Dairy Co Ltd v Hall* (1887) 83 LT Jo 45 (question of breach); *Fellows v Wood* (1888) 59 LT 513 (customers during term of service; two years; covenantor a minor; good); *Evans v Ware* [1892] 3 Ch 502 (5 miles; two years; covenantor a minor; good); *Batho v Tunks* [1892] WN 101 (customers during term of service; no time limit;



good); *Dubowski & Sons v Goldstein* [1896] 1 QB 478, CA (customers during term of service; no time limit; good; doubtful as to customers at any time); *Stride v Martin* (1897) 77 LT 600, DC (particular neighbourhoods; no time limit; good); *Merriott v Martin* (1899) 43 Sol Jo 717 (Southampton; one year; good); *Morrison Fleet & Co Ltd v Fletcher* (1900) 17 TLR 95 (2 miles; no time limit; covenantor a minor; good); *Marshall and Murray Ltd v Jones* (1913) 29 TLR 351 (question of breach; 'customers served by and from' a particular dairy); *Express Dairy Co v Jackson* (1929) 99 LJB 181 (two years not unreasonable); *Home Counties Dairies Ltd v Skilton* [1970] 1 All ER 1227, [1970] 1 WLR 526, CA (customers served during last six months of employment; one year; good); *Dairy Crest Ltd v Pigott* [1989] ICR 92, CA (two years; court to decide upon the appropriate evidence whether in particular circumstances restraint unreasonable; interlocutory injunction granted to covenantee).

24 *De Francesco v Barnum* (1889) 43 ChD 165 (question of proceedings against apprentice during term of apprenticeship): see **LICENSING AND GAMBLING** vol 67 (2008) PARA 237.

25 *Financial Collection Agencies (UK) Ltd v Batey* (1973) 117 Sol Jo 416, CA (debt collector employed in Birmingham office; six months; clients of employer during period of employment; area of restriction Birmingham, Glasgow, Leeds, Liverpool, Manchester; area too wide and covenant too uncertain; bad).

26 *Horner v Graves* (1831) 7 Bing 735 (100 miles; no time limit; bad); *Mallan v May* (1843) 11 M & W 653 (London, or any place in England or Scotland where covenantees might have been practising during term of service; no time limit; good as to London; bad as to the rest); *Harris v Mansbridge* (1900) 17 TLR 21 (question of breach); *Clifford v Phillips* (1907) 51 Sol Jo 748 (question of breach).

27 *Davis v Mason* (1793) 5 Term Rep 118 (10 miles; 14 years; good); *Hayward v Young* (1818) 2 Chit 407 (20 miles; no time limit; good); *Davies v Penton* (1827) 6 B & C 216 (5 miles; no time limit; good); *Rawlinson v Clarke* (1845) 14 M & W 187 (3 miles; no time limit; good; question of breach); *Hastings v Whitley* (1848) 2 Exch 611 (10 miles; no time limit; good); *Sainter v Ferguson* (1849) 7 CB 716 (7 miles; no time limit; good); *Atkyns v Kinnier* (1850) 4 Exch 776 (2½ miles; no time limit; good); *Giles v Hart* (1859) 1 LT 154 (5 miles; no time limit; good); *Carnes v Nesbitt* (1862) 7 H & N 778 (5 miles; no time limit; good; question of damages or injunction); *Fox v Scard* (1863) 33 Beav 327 (12 miles; life of covenantee and ten years; good; question of damages or injunction); *Gravelly v Barnard* (1874) LR 18 Eq 518 (10 miles; so long as covenantee or assignee should practise; good); *Palmer v Mallet* (1887) 36 ChD 411, CA (10 miles; no time limit; good); *Rogers v Drury* (1887) 57 LJCh 504 (question of breach only); *Everton v Longmore* (1899) 15 TLR 356, CA (5 miles; three years; good); *Ballachulish Slate Quarries Ltd v Grant* (1903) 5 F 1105, Ct of Sess (the district in which the covenantor had been employed; no time limit; good); *Robertson v Buchanan* (1904) 73 LJCh 408, CA (2 miles; ten years; good; question of breach only); *Routh v Jones* [1947] 1 All ER 758, CA (10 miles; five years; not excessive, but void because forbidden employments too wide); *Jenkins v Reid* [1948] 1 All ER 471 (5 miles; life; too wide); *Whitehill v Bradford* [1952] Ch 236, [1952] 1 All ER 115, CA (10 miles; 21 year period; not excessive; principles not affected by the national health service); *Kerr v Morris* [1987] Ch 90, [1986] 3 All ER 217, CA (2 miles; two years; interlocutory injunction granted); *Clarke v Newland* [1991] 1 All ER 397, CA (not to practise 'in the practice area'; three years; enforceable). But see *Macfarlane v Kent* [1965] 2 All ER 376 at 381, [1965] 1 WLR 1019 at 1024, where it was questioned whether a covenant not to practise within a prescribed area could ever be reasonable where it was designed to protect the goodwill of a medical practice which could not be sold and had no significant number of paying patients. A covenant not to attend patients who were patients of the partnership would be sufficient to protect goodwill. See also *Lyne-Pirkis v Jones* [1969] 3 All ER 738, [1969] 1 WLR 1293, CA, where in relation to a general practitioner partnership in which substantially all the patients were within a 5-mile radius but the restraint was of a 10-mile radius, it was held that the area might be reasonable, but the restraint void because the forbidden employment was too wide (distinguished in *Clarke v Newland* [1991] 1 All ER 397, CA); *Peyton v Mindham* [1971] 3 All ER 1215, [1972] 1 WLR 8. As to the prohibition of the sale of the goodwill of medical practices in the national health service see **HEALTH SERVICES** vol 54 (2008) PARA 273 et seq.

28 *Broad v Jollyfe* (1620) Cro Jac 596; *Chesman v Nainby* (1727) 1 Bro Parl Cas 234, HL (half a mile at covenantee's house; no time limit; good; but half a mile of any house to which covenantee might move apparently bad); *Brampton v Beddoes* (1863) 13 CBNS 538 (2 miles; no time limit; good; question of breach only); *Watts v Smith* (1890) 62 LT 453 (half a mile; six months; good; question of breach only); *Bailey v Skinner and Fleming, Reid & Co* (1898) 42 Sol Jo 780 (covenant in lease; carrying on part of a business not a breach).

29 *Greer v Sketchley Ltd* [1979] IRLR 445, [1979] FSR 197, CA (director of business which extended only to part of England and Wales; United Kingdom; 12 months; bad).

30 *Dier's Case* (1414) YB 2 Hen 5, fo 5, pl 26; *Bryson v Whitehead* (1822) 1 Sim & St 74 (no limit of space; 20 years; trade secret; good).

31 *Spencer v Marchington* [1988] IRLR 392; *Office Angels Ltd v Rainer-Thomas and O'Connor* [1991] IRLR 214, CA.

32 *Allied Dunbar (Frank Weisinger) Ltd v Weisinger* [1988] IRLR 60. See also *Beckett Investment Management Group Ltd v Hall* [2007] EWCA Civ 613, [2007] IRLR 793; *Arbuthnot Fund Managers Ltd v Rawlings*

[2003] EWCA Civ 518, [2003] All ER (D) 181 (Mar); *Lapthorne v Eurofi Ltd* [2001] EWCA Civ 993, [2001] All ER (D) 209 (Jun).

33 *Hepworth Manufacturing Co Ltd v Ryott* [1920] 1 Ch 1, CA (covenant to act under pseudonym and not on leaving employment to use pseudonym for any purpose whatever; bad). See also **LICENSING AND GAMBLING** vol 67 (2008) PARA 237.

34 *Woods v Thornburn* (1897) 41 Sol Jo 756 (3 miles; no time limit; bad, as applying to 'any other business').

35 *Spink (Bournemouth) Ltd v Spink* [1936] Ch 544, [1936] 1 All ER 597 (10 miles; five years; good).

36 *Pilkington v Scott* (1846) 15 M & W 657 (question of consideration in contract of employment); *Hartley v Cummings* (1847) 5 CB 247 (question of mutuality in contract of employment); *Phillips v Stevens* (1899) 15 TLR 325, DC (question of mutuality in contract of employment).

37 *Daggett v Ryman* (1868) 17 LT 486 (particular place or neighbourhood; no time limit; question of enforcement).

38 *Cavendish v Tarry* (1908) 52 Sol Jo 726 (20 miles; 20 years; good).

39 *Smith v Hancock* [1894] 2 Ch 377, CA (5 miles; ten years; question of breach only); *Pearks Ltd v Cullen* (1912) 28 TLR 371 (shop assistant and occasional canvasser; not to 'establish, carry on, or be engaged in or interested in a business of a similar character' to that of covenantees; 2 miles of any shop of covenantees at which he had been employed within 12 months; two years; bad).

40 *Pellow v Ivey* (1933) 49 TLR 422 (within particular borough; no time limit; bad); *Marion White Ltd v Francis* [1972] 3 All ER 857, [1972] 1 WLR 1423, CA (12 months; half a mile; good).

41 *General Accident Assurance Corp v Noel* [1902] 1 KB 377; *Barr v Craven* (1903) 89 LT 574, CA; see note 4.

42 *Goldsoll v Goldman* [1915] 1 Ch 292, CA (business in imitation jewellery; restraints as to real and imitation jewellery, United Kingdom, France, United States etc; good, when limited to imitation jewellery and to area in which business carried on).

43 *Eastes v Russ* [1914] 1 Ch 468, CA (10 miles; no time limit; bad).

44 *Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026, [1977] 1 WLR 1472, CA (director in charge of company's mail order business; not to enter employment of rival company or its subsidiaries; 12 months; covenant construed as applying only to rival company's mail order business carried on in United Kingdom; good).

45 *Jones v Lees* (1856) 1 H & N 189 (covenant as to use of patent with machine; good); *Harms v Parsons* (1862) 32 Beav 328 (200 miles; no time limit; good); *Clarkson v Edge* (1863) 33 Beav 227 (20 miles; no time limit; good); *Maythorn v Palmer* (1864) 11 LT 261 (question of breach only); *Leather Cloth Co v Lorisont* (1869) LR 9 Eq 345 (Europe; no time limit; good); *Hagg v Darley* (1878) 47 LJCh 567 (no limit of space; 14 years; trade secret; good); *Vernon v Hallam* (1886) 34 ChD 748 (covenant not to trade in particular name; good); *Davies v Davies* (1887) 36 ChD 359, CA (restraint so far as the law allows; bad); *Mills v Dunham* [1891] 1 Ch 576, CA (customers during term of service; good); *Badische Anilin und Soda Fabrik v Schott, Segner & Co* [1892] 3 Ch 447; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, HL (whole world; 25 years; good); *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA (question of covenant applicable during term of service: see PARA 404); *Haynes v Doman* [1899] 2 Ch 13, CA (25 miles; no time limit; good); *Elliman Sons & Co v Carrington & Son Ltd* [1901] 2 Ch 275 (sale of goods; restraint against selling below certain prices; good); *Castelli v Middleton* (1901) 17 TLR 373 (no limit of space or time; good, but decision was as to breach only); *Dowden and Pook Ltd v Pook* [1904] 1 KB 45, CA (no limit airspace; five years; bad); *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, CA (eastern hemisphere; five years; good); *White, Tomkins and Courage v Wilson* (1907) 23 TLR 469 (no limit of space, but limit to special business; five years; good); *Automobile Carriage Builders Ltd v Sayers* (1909) 101 LT 419 (20 miles; ten years from date of engagement; good); *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330, PC (conditions attached to lease of machines; good); *Caribonum Co Ltd v Le Couch* (1913) 109 LT 385 (on appeal 109 LT 587, CA) (trade secret); *Gifford Motor Co Ltd v Horne* [1933] Ch 935, CA (customers or those in habit of dealing during term of service; good); *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL (condition imposing penalties on licensee of patent upon manufacture of more than certain quantities of patented article, payable even after expiration of patent; good).

46 *Hardy v Martin* (1783) 1 Bro CC 419n (brandy merchant; London and 5 miles; 19 years; limit as to quantity sold; good, but question was penalty or damages; see PARA 438 note 1); *Ward v Byrne* (1839) 5 M & W

548 (coal merchant; no limit of space; nine months; bad; but limited as to customers; two years; apparently good); *Turner v Evans* (1852) 2 De GM & G 740 (wine merchant; Carnarvon, Anglesey and Merioneth; no time limit; good, but question of breach only); *Avery v Langford* (1854) Kay 663 (general merchant; large part of Cornwall; no time limit; good); *Mumford v Gething* (1859) 7 CBNS 305 (lace merchants: see note 4); *King v Hansell* (1860) 5 H & N 106 (wine and spirit merchants); *Bishop v Kitchin* (1868) 38 LJQB 20 (hop merchant); *Allen v Taylor* (1870) 39 LJCh 627 (rag merchant; 10 miles; five years; good; question of breach only); *Josselyn v Parson* (1872) LR 7 Exch 127 (ale and spirit merchant: see note 4); *Rousillon v Rousillon* (1880) 14 ChD 351 (wine merchant; no limit of space; two-year limit as a traveller, ten-year limit as to establishing himself in the trade; good); *Webb v Clark* (1884) 78 LT Jo 96 (provision dealer; 1 mile; no time limit; good); *Harvey v Corpe* (1885) 79 LT Jo 246 (see PARA 399 note 2); *Parsons v Cotterill* (1887) 56 LT 839 (wine merchant; 50 miles; no time limit; good); *Perls v Saafeld* [1892] 2 Ch 149, CA (oil merchant: see note 4); *Moenich v Fenestre* (1892) 67 LT 602, CA (commission merchant: see note 4); *Ehrman v Bartholomew* [1898] 1 Ch 671 (wine merchant; 'any other business' during term of service; ten years; covenantor left service at end of seven months in breach of contract; bad); *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA (hay and straw merchant; United Kingdom, France, Belgium, Holland and Canada; 12 months; good); *Hood and Moore's Stores Ltd v Jones* (1899) 81 LT 169 (hay and corn merchants; 2 miles; no time limit; good); *Townsend v Jarman* [1900] 2 Ch 698 (seed and corn merchant; 40 miles; 21 years; question of covenant in gross: see PARA 389); *Delius v Müller* (1901) 45 Sol Jo 737 (wool merchant; 50 miles; ten years; good); *Gophir Diamond Co v Wood* [1902] 1 Ch 950 (jeweller; 20 miles; three years; no dispute as to validity; question of breach); *Servais Bouchard v Prince's Hall Restaurant Ltd* (1904) 20 TLR 574, CA (contract to take wine exclusively from one firm; good); *Hooper and Ashby v Willis* (1906) 22 TLR 451, CA (builders' merchant; 30 miles from either of two places; 14 years; bad); *Cade v Calfe* (1906) 22 TLR 243 (coal merchant; 3 miles; two years; good, but question of breach); *Reeve v Marsh* (1906) 23 TLR 24 (coal and corn merchant; no limit of space; two years; 'directly or indirectly interfere with prejudice or in any manner affect' business of covenantee; held not to prohibit setting up rival business; questionable whether too vague); *William Cory & Son Ltd v Harrison* [1906] AC 274, HL (coal merchant; Great Britain and Isle of Man; no limit of time; validity of covenant not questioned; question of breach); *Henry Leatham & Sons Ltd v Johnstone-White* [1907] 1 Ch 322, CA (hay and corn dealer; see note 4); *Morris & Co v Ryle* (1910) 26 TLR 678, CA (hop merchant: see note 4); *Lovell and Christmas Ltd v Wall* (1911) 104 LT 85, CA (provision merchant; London, Liverpool and Manchester; no time limit; good, but question of breach only); *British Reinforced Concrete Engineering Co Ltd v Schelfff* [1921] 2 Ch 563 (road material dealers; duration of war and three years thereafter; United Kingdom; be concerned in or act as servant of any one concerned in; bad because (1) area too wide; (2) servant clause unreasonable; (3) protection extended beyond business sold); *East Essex Farmers Ltd v Holder* [1926] WN 230 (corn seed, and coal merchants; (a) 25 miles; ten years; bad; (b) soliciting customers who might become such after employment; bad).

47 *Shackle v Baker* (1808) 14 Ves 468 (no writing; interlocutory injunction refused).

48 *Foley v Classique Coaches Ltd* [1934] 2 KB 1, CA (covenant on sale of land to buy all petrol used for business carried on such land from covenantees; good). See also note 69.

49 *Tivoli, Manchester, Ltd v Colley* (1904) 20 TLR 437 (20 miles; term of engagement and six months afterwards; good); *London Music Hall Ltd v Austin* (1908) Times, 16 December (engagement for different weeks over a long period; agreement not to perform at halls in given area within eight months prior to completion of engagement held to refer to each separate week); and see **LICENSING AND GAMBLING** vol 67 (2008) PARA 237.

50 *McFarlane v Hilton* [1899] 1 Ch 884 (question of breach only); *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763, CA (20 miles; no time limit; covenantee a minor; bad); *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266, [1954] 1 WLR 815, CA (unlimited in area; not too wide if restricted to apply to competing businesses; application to similar businesses severed).

51 *Cooke v Colcraft* (1773) 2 Wm Bl 856 (question of burden of covenant passing to executors).

52 *Jacoby v Whitmore* (1883) 49 LT 335, CA (1 mile; no time limit; good).

53 *Lumley v Wagner* (1852) 1 De GM & G 604; and see **LICENSING AND GAMBLING** vol 67 (2008) PARA 237.

54 *Dales v Weaber* (1870) 18 WR 993 (5 miles; no time limit; good; question of breach only).

55 *Lake v Harrison* (1897) 13 TLR 568 (4 miles; two years; good; question of breach).

56 *Jones v Lees* (1856) 1 H & N 189; *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 (covenant to assign future patent rights; good); *Mouchel v Cubitt & Co* (1907) 24 RPC 194 (covenant by licensee not to execute work in competition with the patent during term of licence; good); *Bescot (Electric) Ltd v Merlin Mouldings Ltd* (1952) 69 RPC 297 (undertaking not to manufacture 'in future', held limited to duration of patent); *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL (condition imposing penalties on licensee upon manufacture of more than certain quantities of patented article, payable even after expiration of patent; good); see also **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARAS 403, 511.

57 *Price v Green* (1847) 16 M & W 346, Ex Ch (London and Westminster; no time limit; good; but 600 miles bad).

58 *Petrofina (Great Britain) Ltd v Martin* [1966] Ch 146, [1966] 1 All ER 126, CA (solus agreement in gross, restricting covenantor to single supplier of petrol for minimum of 12 years; some restrictions also with regard to lubricating oils; covenantor bound to keep station open at all reasonable hours and required, on a sale of the station, to procure the purchaser to assume the obligations of the agreement; bad); *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269, [1967] 1 All ER 699, HL (tie of four years and five months, good; tie of 21 years, bad; doctrine of restraint of trade not excluded by reason of covenants being contained in mortgage). But see *Cleveland Petroleum Co Ltd v Dartstone Ltd* [1969] 1 All ER 201, [1969] 1 WLR 116, CA, where the doctrine of restraint of trade was held not to apply to restrictions in a lease under which the covenantor entered into possession. Cf *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA (lease and lease-back).

59 *Stewart v Stewart* (1899) 1 F 1158, Ct of Sess (20 miles; no time limit; good, but question of covenant by a person not employed in the business to be protected: see PARA 389).

60 *M'Allen v Churchill* (1826) 11 Moore CP 483 (no limit of space; five years; apparently bad); *Loe v Lardner* (1856) 4 WR 597 (1 mile; no time limit; question of breach only); *Moufflet v Cole* (1872) LR 8 Exch 32, Ex Ch (half a mile; no time limit; good, but question of measurement only, overruling *Leigh v Hind* (1829) 9 B & C 774); *Clegg v Hands* (1890) 44 ChD 503, CA (tied house covenant); *Cattermoul v Jared* (1909) 53 Sol Jo 244 (question of construction).

61 *Tallis v Tallis* (1853) 1 E & B 391 (London, Middlesex, Surrey, 150 miles from General Post Office; Edinburgh, Dublin, and 50 miles from each; any place in Great Britain or Ireland where covenantee or his successors might carry on business or have carried on business within the past six months; no time limit; good as to London and 150 miles and other places where covenantee carried on business); *Welstead v Hadley* (1904) 21 TLR 165, CA (London and 20 miles; ten years; good).

62 *Bird v Lake* (1863) 1 Hem & M 111, 338 (1 mile; no time limit; good, but question of breach only); *Drew v Guy* [1894] 3 Ch 25, CA (meaning of 'similar business').

63 *Pemberton v Vaughan* (1847) 10 QB 87 (maker and seller of ginger beer; 1 mile; no time limit; good); *Middleton v Brown* (1878) 47 LJCh 411, CA (oil vendor in street; 8 miles; 12 months; good).

64 *Gale v Reed* (1806) 8 East 80 (question of consideration in contract for exclusive employment).

65 *Jones v Heavens* (1877) 4 ChD 636 (10 miles; no time limit; good, but question of breach only).

66 *Smith v Hawthorn* (1897) 76 LT 716 (9 miles; 12 years; good); *Berlitz School of Languages v Duchêne* (1903) 6 F 181, Ct of Sess (any town where covenantor employed, or where there is a branch of covenantee's business, or within 10 miles; two years; not certain whether good); *Lievre v Mayonnet* (1913) 2 LJCCR 4 (10 miles of Bradford and at certain other places; five years; uncertain whether too wide, but severable).

67 *Bunn v Guy* (1803) 1 Smith KB 1 (150 miles; no time limit; good); *Capes v Hutton* (1826) 2 Russ 357 (question of minority; covenant by father of articulated clerk); *Whittaker v Howe* (1841) 3 Beav 383 (Great Britain; 20 years; good); *Nicholls v Stretton* (1847) 10 QB 346 (clients during term of service; no time limit; good, and severable); *Galsworthy v Strutt* (1848) 1 Exch 659 (seven years; 50 miles; good; decision as to liquidated damages or penalty); *Dendy v Henderson* (1855) 11 Exch 194 (21 years; 21 miles; good); *Duignan v Walker* (1859) John 446 (7 miles; no time limit; good; question of measurement); *Howard v Woodward* (1864) 10 Jur NS 1123 (50 miles; no time limit; good); *May v O'Neill* (1875) 44 LJCh 660 (London, Middlesex and Essex; no time limit; good; also, clients of covenantee during term of service; no limit of space or time; good); *Hayne v Burchell* (1890) 35 Sol Jo 88, CA (not to take away or transact business for clients of covenantee; life of covenantee; apparently good, but no breach); *Llewellyn v Simpson* (1891) 91 LT Jo 9 (question of breach only); *Richards v Whitham* (1892) 66 LT 695, CA (question of enforcement of covenant by articulated clerk, a minor, and remedy of covenantor who has undertaken liability on account of minor); *Badham v Williams* (1900) 83 LT 141 (question of breach only); *Edmundson v Render* [1905] 2 Ch 320 (15 miles; no time limit; good); *Lewis and Lewis v Durnford* (1907) 24 TLR 64; *Woodbridge & Sons v Bellamy* [1911] 1 Ch 326, CA; *Freeman v Fox* (1911) 55 Sol Jo 650 (question of breach); *Fitch v Dewes* [1921] 2 AC 158, HL (7 miles; no time limit; good); *Way v Bishop* [1928] Ch 647, CA (5 miles; ten years; validity of restraint not questioned; question of breach); *Dickson v Jones* [1939] 3 All ER 182 (15 miles; life; too wide); *Bridge v Deacons (a firm)* [1984] AC 705, sub nom *Deacons (a firm) v Bridge* [1984] 2 All ER 19, PC (Hong Kong; not for 5 years to act as a solicitor for a client of the firm within 3 years of the covenantor leaving the firm; good), in this case the Privy Council specifically disagreed with the view of the Court of Appeal in *Oswald Hickson, Collier & Co v Carter-Ruck* [1984] AC 720n, [1984] 2 All ER 15, CA, that a clause in a solicitor's partnership deed preventing one of the partners from acting for a client in the future would be contrary to public policy; see also *Edwards v Worboys* [1984] AC 724n, [1984] 2 WLR 850n, CA (not to practise within 5 miles of the firm, not to act for anyone resident within 5 miles of the firm, not to act for

any client of the firm within five years of the covenantor leaving the firm: interlocutory injunctions to enforce covenants granted); *Briggs v Oates* [1991] 1 All ER 407 (salaried partner; termination of agreement a breach of contract; restraint of trade clause therefore not binding; further, 5 miles, five year clause in employment contract where employee wrongfully dismissed 'grossly unreasonable'). An English barrister practising in a colony or dependency where the functions of barristers and solicitors are fused may be restrained from practice: *Home v Douglas* (1912) Times, 15 November.

68 *A Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616, [1974] 1 WLR 1308, HL, where there was an agreement in the publishers' standard form for a song writer's exclusive services for a period of five years automatically extended to ten years if royalties in the initial period exceeded a certain sum. The song writer was obliged to assign world copyright in all his musical compositions during the term, but there was no obligation on the publishers to publish so that the song writer might receive almost no remuneration; the song writer had no right to terminate the agreement. It was held that the restrictions required justification and were bad. See also *Clifford Davis Management Ltd v WEA Records Ltd* [1975] 1 All ER 237, [1975] 1 WLR 61, CA; *Zang Tumb Tuum Records Ltd v Johnson* [1993] EMLR 61, (1989) Independent, 2 August, CA; *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] EMLR 233.

69 *Williams v Williams* (1818) 2 Swan 253 (any coach between Reading and London; no time limit; good); *Leighton v Wales* (1838) 3 M & W 545 (not to compete; so long as covenantee carried on the business; good, but question of consideration only).

70 *Collins v Locke* (1879) 4 App Cas 674, PC (agreement to prevent competition: see PARA 367 note 10).

71 *Lyddon v Thomas* (1901) 17 TLR 450 (50 miles; 20 years; good).

72 *Hunlocke v Blacklowe* (1670) 2 Saund 156; *Rolfe v Rolfe* (1846) 15 Sim 88 (20 miles; no time limit; good); *Newling v Dobell* (1868) 38 LJCh 111 (5 miles to east and 2 miles to west of High Holborn; three years; good); *Davey v Shannon* (1879) 4 ExD 81 (5 miles; no time limit; question of fraud); *Nicoll v Beere* (1885) 53 LT 659 (10 miles; three years; good); *Baker v Hedgecock* (1888) 39 ChD 520 (1 mile; two years; covenant bad as restraining from all business); *Beetham v Fraser* (1904) 21 TLR 8 ('not to enter into any business arrangement in competition with or that would in any way interfere with' business of covenantee; bad as too wide and too vague); *Attwood v Lamont* [1920] 3 KB 571, CA (10 miles; no time limit; bad); *Putsman v Taylor* [1927] 1 KB 741, CA (covenants for five years (1) not to set up as tailor; (2) not to enter employment of trade rival; (3) not to be employed by any tailor in certain districts; good).

73 *Colmer v Clark* (1734) 7 Mod Rep 230 (within 'Westminster and bills of mortality' (ie the metropolitan area before 1855); seven years; good).

74 *Baxter v Lewis* (1886) 30 Sol Jo 705, 754 (5 miles; no time limit; good); *Pellow v Ivey* (1933) 49 TLR 422 (within the borough; no time limit; bad).

75 See *Ware and De Freville Ltd v Motor Trade Association* [1921] 3 KB 40, CA; *Auto-Mart (London) Ltd v Chilton* (1927) 43 TLR 463; *Hardie and Lane Ltd v Chilton* [1928] 2 KB 306, CA; *R v Denyer* [1926] 2 KB 258, CCA; *Thorne v Motor Trade Association* [1937] AC 797, [1937] 3 All ER 157, HL; *Berg v Sadler and Moore* [1937] 2 KB 158, [1937] 1 All ER 637, CA; *British Motor Trade Association v Salvadori* [1949] Ch 556, [1949] 1 All ER 208.

76 *Martin v Brunsden* (1894) 98 LTJo 237, DC (1 mile; ten years; good); *Dottridge Bros Ltd v Crook* (1907) 23 TLR 644 (10 miles; no time limit; good); *Dawson v Taylor* (1959) 110 L Jo 121 (within boroughs of Warwick and Leamington; five years; good).

77 *Howard v Danner* (1901) 17 TLR 548 (service of rival restaurant; less than one year; good; question of consideration only).

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(ix) Severability/433. Severance of unenforceable part.

## **(ix) Severability**

### **433. Severance of unenforceable part.**

A contract in unreasonable restraint of trade is unenforceable; it is not illegal in any criminal sense, nor does it give a cause of action to any third person injured by its operation<sup>1</sup>. Its presence does not necessarily vitiate the whole contract<sup>2</sup>, and parts of an agreement in restraint of trade may be severable and effect may be given to that part which is reasonable<sup>3</sup>, whether the severance is in respect of subject matter<sup>4</sup>, or of space<sup>5</sup>, or of time<sup>6</sup>, or of persons with whom there may be dealings<sup>7</sup>.

Severance will be more readily allowed of a restraint between vendor and purchaser than of one between employer and employee<sup>8</sup>.

1 See PARA 383 note 6.

2 *Baines v Geary* (1887) 35 ChD 154 at 158; *Re Prudential Assurance Co's Trust Deed, Horne v Prudential Assurance Co Ltd* [1934] Ch 338, where the inclusion of a covenant in restraint of trade was held not to invalidate the pension scheme as a whole. Cf *M'Allen v Churchill* (1826) 11 Moore CP 483; *Dendy v Henderson* (1855) 11 Exch 194 at 201 per Martin B; *Marshall v NM Financial Management Ltd* [1997] 1 WLR 1527, [1997] ICR 1065, CA.

3 As to the general principle see *Winchcombe v Pigot* (1614) 2 Bulst 246, sub nom *Pigot's Case* (1614) 11 Co Rep 26b at 27a; *Wallis v Day* (1837) 2 M & W 273, where it was held that if a party makes several contracts, one of which is illegal, he is nevertheless liable to perform the others; and **CONTRACT** vol 9(1) (Reissue) PARA 877. As to severing in the case of byelaws see **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1195; **LOCAL GOVERNMENT** vol 69 (2009) PARA 560. As to reasonableness generally see PARA 390 et seq.

4 *Mumford v Gething* (1859) 7 CBNS 305; *Davies v Davies* (1887) 36 ChD 359 at 372 per Kekewich J (revsd by the Court of Appeal, but not so as to affect the general proposition that covenants may be severed in a proper case); *Parsons v Cotterill* (1887) 56 LT 839, where the restraint was as to the business of a wine and spirit merchant, or any branch of it, and apparently it was considered that the sale of beer, if included, may be severable; *Baker v Hedgecock* (1888) 39 ChD 520, where Chitty J refused to sever (see PARA 434 note 1); *Rogers v Maddocks* [1892] 3 Ch 346, CA, where a restraint as to selling ale, beer etc was held severable from a restraint from selling aerated waters; *Moenich v Fenestre* (1892) 67 LT 602 at 604, CA, per Stirling J, where it was apparently considered that goods with which the covenantor dealt might be severed from goods with which he had ceased to deal; *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, CA, where a restraint as to the business of a manufacturer of guns etc was held severable from a restraint against any business competing with that for the time being carried on by the covenantees (cf on appeal sub nom *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 560, HL, per Lord Macnaghten); *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451, CA, where a restraint as to any business similar to that of the covenantee was held severable from a restraint as to any business whatever and from a power to extend the term of the restraint; *Haynes v Doman* [1899] 2 Ch 13 at 24, CA, where it was held, in considering a restraint as to the same kind of business as the covenantee's, that any part of the restraint which was unreasonable would be severed; *Beetham v Fraser* (1904) 21 TLR 8, DC, where the court refused to sever (see PARA 434 note 2); *Hooper and Ashby v Willis* (1905) 21 TLR 691 (affd (1906) 22 TLR 451, CA), where a restraint as to the business of a builders' merchant was held severable from a restraint against manufacturing or dealing in cement and other materials manufactured by the covenantees during the term of service or any other business of a like nature to the business carried on or which might be carried on during the term, but an area of 30 miles was unreasonable and could not be severed; *Bromley v Smith* [1909] 2 KB 235, where a restraint as to the business of a baker was held severable from a restraint against carrying on business as a confectioner or carrying on other business; *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308, where a restraint as to 'india-rubber goods whether wholesale or retail' imposed on a rubber tyre company salesman was held not severable but as to the area of restraint, the United Kingdom was held severable from Germany and France; *SV Nevanas & Co Ltd v Walker and Foreman* [1914] 1 Ch 413, where the covenant was not to carry on the business of importer of meat or any other trade or business similar to any trade or business carried on by the covenantees and the restraint not to carry on a business of importer of meat was held severable; *Goldson v Goldman* [1915] 1 Ch 292, CA, where the restraint was as to real or imitation jewellery and the restraint as to imitation jewellery was held severable, as was the restraint as to the United Kingdom, which could be severed from a restraint from selling in other parts of the world; *British Reinforced Concrete Engineering Co Ltd v Schelff* [1921] 2 Ch 563, where the covenant by the vendor of the business of selling certain products was not to carry on or be concerned as an employee in any business for the manufacture or sale of any products, and it was held that the manufacture clause was severable but that the employment clause was not severable because this was the main purport of the covenant; *Putsman v Taylor* [1927] 1 KB 637, DC (on appeal [1927] 1 KB 741, CA, where the question of severance was not considered), where a covenant by a tailors' manager and cutter employed at A was not to set up as a tailor nor to be employed in any capacity by any tailor in A, B or C, and it was held that the restraint not to be so employed at A was severable (cf *Sir WC Leng & Co Ltd v Andrews* [1909] 1 Ch 763 at 766, CA, where the court refused to treat the covenant as severable); *Atwood v Lamont* [1920] 3 KB 571, CA, where a covenant by an assistant to a draper, tailor and

general outfitter not to be concerned in the trade or business of, among other things, a tailor, dressmaker, general draper or outfitter within 10 miles was held not severable; *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266, [1954] 1 WLR 815, CA, where a restraint unlimited in area was held severable so as to apply to competing business only, and not to similar businesses; *T Lucas & Co Ltd v Mitchell* [1974] Ch 129, [1972] 3 All ER 689, CA, where a restraint on dealing in goods and on soliciting and supplying was held severable. Cf also *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA. See also I Smith LC (13th Edn) 486-489.

5 *Chesman v Nainby* (1727) 1 Bro Parl Cas 234, HL, where a restraint not to trade within half a mile of the covenantor's house was severable from the provision 'or any house he might remove to'; *Mallan v May* (1843) 11 M & W 653, where the restraint on a dentist's assistant not to practise in London was severable from the restraint against practising in any of the towns or places in England or Scotland where the covenantees might have been practising during the period of service; *Rannie v Irvine* (1844) 7 Man & G 969 (see PARA 391 note 1); *Price v Green* (1847) 16 M & W 346, Ex Ch, where on the sale of a share of a partnership in a perfumery business a restraint as to London and Westminster was severed from the words '600 miles therefrom' and it was said that there is no distinction in this respect between a covenant and a bond; *Tallis v Tallis* (1853) 1 E & B 391, where a restraint as to London and 150 miles was held reasonable and as to Edinburgh and Dublin held severable, if unreasonable; *Dendy v Henderson* (1855) 11 Exch 194 at 201 per Martin B; *Leather Cloth Co v Lonsont* (1869) LR 9 Eq 345 at 351 per James V-C; *Baker v Hedgecock* (1888) 39 ChD 520, where Chitty J refused to sever (see PARA 434 note 1); *Davies, Turner & Co v Lowen* (1891) 64 LT 655, where a restraint as to a town in which the covenantees had no business was held severable, as was a restraint as to business 'hereafter to be carried on'; *E Underwood & Son Ltd v Barker* [1899] 1 Ch 300, CA, where the restraint related to the business of a hay and straw merchant in the United Kingdom and certain foreign countries and the view was that the agreement as to the foreign countries would be severable if unreasonable but that in this instance such a provision was not unreasonable (see PARA 401 notes 2-3); *Beetham v Fraser* (1904) 21 TLR 8, DC, where the court refused to sever (see PARA 434 note 2); *Hooper and Ashby v Willis* (1905) 21 TLR 691 (affd (1906) 22 TLR 451, CA) (see note 4; and PARA 434 note 1); *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 (see note 4); *Lievre v Mayonnet* (1913) 2 LJCCR 4, where the restraint was as to Bradford and 10 miles, and also as to certain other places, and Bradford was held severable; *Caribonum Co Ltd v Le Couch* (1913) 109 LT 385 (on appeal 109 LT 587, CA); *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL, where the court refused to enforce such part as it might consider reasonable of a restriction on carrying on business within 25 miles of London; *Goldsoll v Goldman* [1915] 1 Ch 292, CA (see note 4); *Attwood v Lamont* [1920] 3 KB 571, CA (see note 4); *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266, [1954] 1 WLR 815, CA (see note 4); *Scorer v Seymour-Johns* [1966] 3 All ER 347, [1966] 1 WLR 1419, CA, where a covenant by an estate agent's clerk and negotiator not to carry on or work in similar business within 5 miles of the branch office which he managed or the head office was held severable as to the head office.

6 *Baker v Hedgecock* (1888) 39 ChD 520, where Chitty J refused to sever (see PARA 434 note 1); *Lewis and Lewis v Durnford* (1907) 24 TLR 64, where a restraint on a solicitor's clerk not to solicit 'any person who for the time being is or who has within five years previously been a client' of the covenantees or not to act for 'any person who is or has within the previous five years been a client' of the covenantees was held to refer to the date of termination of service and was therefore reasonable but, had it been unreasonable, it would have been severable; *Caribonum Co Ltd v Le Couch* (1913) 109 LT 385 (on appeal 109 LT 587, CA); *Rex Stewart Jeffries Parker Ginsberg Ltd v Parker* [1988] IRLR 483, CA (covenant not to solicit anyone who 'is or has been during your period of employment a customer of the company': words 'is or' severed as they could apply to new customers of the company after the employee's employment terminated).

7 *Rannie v Irvine* (1844) 7 Man & G 969 (see PARA 391 note 1); *Nicholls v Stretton* (1847) 10 QB 346, where a restraint on a solicitor's clerk as to clients of the covenantor before or during the term of service was held severable from a restraint as to clients who became so afterwards (cf earlier proceedings for an injunction in equity on the same covenant (1843) 7 Beav 42: see PARA 407 note 1); *Leather Cloth Co v Lonsont* (1869) LR 9 Eq 345 at 351 per James V-C; *Baines v Geary* (1887) 35 ChD 154, where a restraint imposed on a milk carrier as to customers belonging at any time to the covenantor was held good as to those who were customers during the term of service (see PARA 407 note 1); *Mills v Dunham* [1891] 1 Ch 576 at 581, CA, per Chitty J, where a covenant not to call on or solicit orders from or deal with customers was apparently severable; *Clements v London and North Western Rly Co* [1894] 2 QB 482, CA; *Dubowski & Sons v Goldstein* [1896] 1 QB 478 at 483, CA, where the restraint as to (1) customers during the term of service, and (2) customers afterwards, was held severable if (2) was unreasonable but it was questionable if it was unreasonable (see PARA 407 note 1); *Lewis and Lewis v Durnford* (1907) 24 TLR 64 (see note 6); *Rex Stewart Jeffries Parker Ginsberg Ltd v Parker* [1988] IRLR 483, CA (see note 6) (covenant not to solicit customers of the company 'or associated companies': words 'or associated companies' severed).

8 See *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266 at 270, [1954] 1 WLR 815 at 820, CA, per Jenkins LJ, applying *Goldsoll v Goldman* [1915] 1 Ch 292, CA, and distinguishing *Attwood v Lamont* [1920] 3 KB 571, CA, on this point. Cf *Putsman v Taylor* [1927] 1 KB 637 at 641, DC; and note 4.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(ix) Severability/434. Conditions for severance.

#### 434. Conditions for severance.

An agreement may be severed if:

- (1) the severed parts are independent of one another and are substantially equivalent to a number of separate covenants<sup>1</sup>;
- (2) the severance can be effected without affecting the meaning of the part remaining<sup>2</sup>, and
- (3) the excess to be severed is not a part of the main purport and substance of the agreement<sup>3</sup>.

On a similar principle, where a covenant is so worded as to cover cases which may possibly arise but to which it cannot reasonably be applied, the unreasonable and hypothetical cases may be treated as severable and the covenant will not be void as a whole<sup>4</sup>.

1 *Price v Green* (1847) 16 M & W 346, Ex Ch; *Baker v Hedgecock* (1888) 39 ChD 520, where the restraint was as to 'any business whatsoever' and the court refused to hold this good in so far as it referred to the business of a tailor; *Woods v Thornburn* (1897) 41 Sol Jo 756, where a restraint as to 'any other business' was held not severable and too wide; *Hooper and Ashby v Willis* (1905) 21 TLR 691 (affd (1906) 22 TLR 451, CA); *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 745, HL, per Lord Moulton; *SV Nevanas & Co Ltd v Walker and Foreman* [1914] 1 Ch 413; *Goldsoll v Goldman* [1915] 1 Ch 292, CA; *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA; *Attwood v Lamont* [1920] 3 KB 571, CA; *Putsman v Taylor* [1927] 1 KB 637, DC (on appeal [1927] 1 KB 741, CA, where the question of severance was not considered); *Ronbar Enterprises Ltd v Green* [1954] 2 All ER 266, [1954] 1 WLR 815, CA; *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] AC 561, [1975] 1 All ER 968, PC, where severance was not permitted of covenants in restraint of trade which formed the very essence of a lease; *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388 at 391-392. See also *Continental Tyre and Rubber (Great Britain) Co Ltd v Heath* (1913) 29 TLR 308 at 310 per Scrutton J (approving *Baker v Hedgecock* (1888) 39 ChD 520). Cf *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303, [1985] 1 WLR 173, CA.

2 *Perls v Saalfeld* [1892] 2 Ch 149 at 157, CA, where a covenant by a clerk to an oil importer etc not to accept a situation or establish himself within 15 miles for three years without permission not to be withheld if the covenantee was satisfied that the situation was not in a competing business was held unreasonable; *Haynes v Doman* [1899] 2 Ch 13 at 25, CA, where Lindley MR said 'I am not considering restrictions so worded as to be partly good and partly bad, and in which the good parts are dependent on the bad. Such restrictions are void in toto, the bad parts infecting and destroying the whole'; *Beetham v Fraser* (1904) 21 TLR 8, DC, where Lord Alverstone CJ said: 'We cannot break up covenants of this sort unless, after severance, an enforceable contract remains'; *SV Nevanas & Co Ltd v Walker and Foreman* [1914] 1 Ch 413 at 422 per Sargant J; *Attwood v Lamont* [1920] 3 KB 571 at 577, CA, per Lord Sterndale MR; *British Reinforced Concrete Engineering Co Ltd v Schelff* [1921] 2 Ch 563; *Putsman v Taylor* [1927] 1 KB 637, DC (on appeal [1927] 1 KB 741, CA, where the question of severance was not considered); *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388. Cf *Card v Hope* (1824) 2 B & C 661 at 672. However, it is not the law that severance is always permissible where it can effectively be accomplished by the use of a blue pencil, and this test is a misleading one: *Attwood v Lamont* [1920] 3 KB 571 at 578, CA, per Lord Sterndale MR, and at 593 per Younger LJ.

3 *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 745, HL, per Lord Moulton; *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA; *Attwood v Lamont* [1920] 3 KB 571 at 594, CA, per Younger LJ; *British Reinforced Concrete Engineering Co Ltd v Schelff* [1921] 2 Ch 563. See also *Amoco Australia Pty Ltd v Rocca Bros Motor Engineering Co Pty Ltd* [1975] AC 561, [1975] 1 All ER 968, PC; *Bennett v Bennett* [1952] 1 KB 249 at 254, [1952] 1 All ER 413 at 417, CA; *Goodinson v Goodinson* [1954] 2 QB 118 at 123-124, [1954] 2 All ER 255 at 258, CA; *Sadler v Imperial Life Assurance Co of Canada Ltd* [1988] IRLR 388; *Alec Lobb (Garages) Ltd v Total Oil GB Ltd* [1985] 1 All ER 303 at 311, [1985] 1 WLR 173 at 181, CA, per Dillon LJ, at 315-316 and 186 per Dunn LJ, and at 320 and 191 per Waller LJ; *Inntrepreneur Estates Ltd v Mason* [1993] 2 CMLR 293; and *Inntrepreneur Estates (GL) Ltd v Boyes* (1993) 68 P & CR 77, [1993] 2 EGLR 112, CA (case concerning unenforceability of agreements infringing the EC Treaty art 85(1) (now 81(1): see generally PARA 61 et seq)). It is



submitted that Lord Moulton's observation as reported in *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724 at 745, HL, that the excess severed must be of trivial importance or merely technical does not correctly state the law. See also *SV Nevanas & Co Ltd v Walker and Foreman* [1914] 1 Ch 413 at 423 per Sargant J; *Goldson v Goldman* [1915] 1 Ch 292, CA; *British Reinforced Concrete Engineering Co Ltd v Schelfff* [1921] 2 Ch 563; *Putman v Taylor* [1927] 1 KB 637, DC (on appeal [1927] 1 KB 741, CA); *T Lucas & Co Ltd v Mitchell* [1974] Ch 129, [1972] 3 All ER 689, CA.

4 *Haynes v Doman* [1899] 2 Ch 13 at 24-25, CA, per Lindley MR; cf *Mitchel v Reynolds* (1711) 1 P Wms 181 at 197; *Rannie v Irvine* (1844) 7 Man & G 969 at 976; *Taff Vale Rly Co (Directors etc) v Macnabb* (1873) LR 6 HL 169 at 178-179 per Lord Colonsay; *Rousillon v Rousillon* (1880) 14 ChD 351 at 366; *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 at 574, HL; see PARA 391 note 1.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(x) Remedies for Breach/435. Election between alternative remedies.

## (x) Remedies for Breach

### 435. Election between alternative remedies.

In a proper case a valid covenant in restraint of trade may be enforced by injunction notwithstanding that it provides for the payment of a sum by way of liquidated damages<sup>1</sup>. However, the covenantee cannot obtain both the sum by way of liquidated damages and an injunction, but must elect between the two<sup>2</sup> with the exception that he should be able to obtain damages for past breaches even though he requires an injunction in relation to future ones. Election may be made in the statement of case, and is not affected by the fact that both remedies have been claimed<sup>3</sup>.

1 *Fox v Scard* (1863) 33 Beav 327; *William Robinson & Co Ltd v Heuer* [1898] 2 Ch 451 at 458, CA, per Chitty J. In *Jones v Heavens* (1877) 4 ChD 636, the contrary proposition was argued, but the point was ignored in the judgment. Where a company is set up as a cloak to enable the covenantor to carry out a breach of covenant, the company may be restrained by injunction as well as the covenantor: *Gilford Motor Co Ltd v Horne* [1933] Ch 935, CA. See further **CIVIL PROCEDURE** vol 11 (2009) PARA 428. For instances of enforcement of injunctions by committal see *Middleton v Brown* (1878) 47 LJCh 411, CA; *Dottridge Bros Ltd v Crook* (1907) 23 TLR 644. As to the enforcement of injunctions generally see **CIVIL PROCEDURE** vol 12 (2009) PARA 1249. The court has, apparently, a discretion to limit the extent of the injunction: cf *Cussen v O'Connor* (1893) 32 LR Ir 330. The injunction should, it seems specify so far as possible the precise nature of the acts prohibited: *Provident Clothing and Supply Co Ltd v Mason* [1913] 1 KB 65 at 77, CA; revsd without affecting this point sub nom *Mason v Provident Clothing and Supply Co Ltd* [1913] AC 724, HL.

2 *Sainter v Ferguson* (1894) 1 Mac & G 286; *Coles v Sims* (1854) 5 De GM & G 1; *Carnes v Nesbitt* (1862) 7 H & N 778; *Fox v Scard* (1863) 33 Beav 327; *Howard v Woodward* (1864) 10 Jur NS 1123; *Young v Chalkley* (1867) 16 LT 286; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112, CA; *General Accident Assurance Corp'n v Noel* [1902] 1 KB 377; cf *French v Macale* (1842) 2 Dr & War 269 at 276; *Robb v Green* [1895] 2 QB 315, CA; *Lewis and Lewis v Durnford* (1907) 24 TLR 64. As to the common law principle of election see generally **ESTOPPEL** vol 16(2) (Reissue) PARA 962.

3 *Lewis and Lewis v Durnford* (1907) 24 TLR 64. Cf *Cargill v Bower* (1878) 10 ChD 502 at 508; and see generally **CIVIL PROCEDURE**. In *Sainter v Ferguson* (1849) 1 Mac & G 286, the covenantee had recovered judgment for the liquidated damages and costs at law, and proved for the costs only in bankruptcy, and it was held that he had elected, although, apparently, the court might on a proper application have made an order so limited as to keep his right alive. Cf *Fox v Scard* (1863) 33 Beav 327, where it was held that if a claimant recovered only nominal damages at law in a case where a court of equity had sent him to law to try his right, he did not lose his right to an injunction; it would be otherwise if he obtained substantial damages. Occasionally the court has refused costs to a defendant who has successfully established that his covenant is in restraint of trade: *Allsopp v Wheatcroft* (1872) LR 15 Eq 59; *Ehrman v Bartholomew* [1898] 1 Ch 671 at 674; *Lamson Pneumatic Tube Co v Phillips* (1904) 91 LT 363, CA, where, however, as the judgment was reversed in the Court of Appeal, no question as to those costs arose in that court.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(x) Remedies for Breach/436. Mutuality of performance of covenants.

#### **436. Mutuality of performance of covenants.**

A restrictive covenant will not be enforced by injunction, nor will damages be awarded for its breach<sup>1</sup>, if the stipulations of the covenantee and covenantor are mutually dependent, unless the covenantee has performed and is willing and able to perform in future his part of the contract of which the covenant forms a part<sup>2</sup>. However, such a covenant will be enforced even though the agreement contains other covenants which cannot be specifically enforced, if those other covenants are capable of being separated<sup>3</sup>.

Where an employer repudiates a contract of employment, and the employee accepts the repudiation, any restrictive covenant in the contract of employment is thereby terminated, so that the question of its reasonableness does not arise<sup>4</sup>.

1 *Measures Bros Ltd v Measures* [1910] 2 Ch 248 at 262, CA, per Kennedy LJ. Cf **CIVIL PROCEDURE** vol 11 (2009) PARA 467.

2 *General Billposting Co Ltd v Atkinson* [1909] AC 118, HL; *Measures Bros Ltd v Measures* [1910] 2 Ch 248 at 262, CA, where it was held that a compulsory winding-up order operates as a wrongful dismissal of a covenantor, releasing him from his covenant: see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 490; but cf *Welstead v Hadley* (1904) 21 TLR 165, CA, where the appointment of a receiver for debenture holders and dismissal by him of the managing director does not release the director from a covenant not to trade. However, if an employee is paid a week's salary in lieu of notice and dismissed, that is not a wrongful dismissal releasing him from a restrictive covenant: *W Dennis & Sons Ltd v Tunnard Bros and Moore* (1911) 56 Sol Jo 162. As to the question whether stipulations are dependent or independent see **CONTRACT** vol 9(1) (Reissue) PARA 967; **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 266 et seq. As to the effect of the claimant's conduct on the right to an injunction see **CIVIL PROCEDURE** vol 11 (2009) PARA 467.

3 *Whittaker v Howe* (1841) 3 Beav 383 at 395; *Rolfe v Rolfe* (1846) 15 Sim 88, where A, a retiring partner in a tailor's business, covenanted with B not to trade within certain limits, and B covenanted to employ A so long as B continued in the business; an injunction was granted against A, although B's covenant could not have been specifically enforced; *Daggett v Ryman* (1868) 17 LT 486; cf *Kemble v Kean* (1829) 6 Sim 333 at 335 per Shadwell V-C. As to the enforcement of positive and negative covenants, and the cases in which negative covenants will be implied, see **CIVIL PROCEDURE** vol 11 (2009) PARA 448 et seq.

4 *Rock Refrigeration Ltd v Jones* [1997] 1 All ER 1, [1997] ICR 938, CA, overruling *D v M* [1996] IRLR 192.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(x) Remedies for Breach/437. Affirmation and acquiescence.

#### **437. Affirmation and acquiescence.**

It is not possible to challenge a contract as being in restraint of trade after it has been affirmed<sup>1</sup> at common law; nor where there has been acquiescence<sup>2</sup> in equity<sup>3</sup>.

1 As to affirmation see **CONTRACT** vol 9(1) (Reissue) PARAS 1010-1011.

2 As to acquiescence see **EQUITY** vol 16(2) (Reissue) PARA 909.

3 *Panayiotou v Sony Entertainment (UK) Ltd* [1994] EMLR 233.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(x) Remedies for Breach/438. Liquidated sum.

#### **438. Liquidated sum.**

Where liquidated damages are fixed by the agreement, the covenantee is entitled to the agreed sum, unless the sum is in reality a penalty and not liquidated damages<sup>1</sup>, but it seems clear that he cannot recover the agreed sum more than once<sup>2</sup>.

1 *Shackle v Baker* (1808) 14 Ves 468; *Davies v Penton* (1827) 6 B & C 216; *Leighton v Wales* (1838) 3 M & W 545; *Boys v Ansell* (1839) 7 Scott 364; *Horner v Flintoff* (1842) 9 M & W 678; *Price v Green* (1847) 16 M & W 346, Ex Ch; *Galsworthy v Strutt* (1848) 1 Exch 659; *Atkyns v Kinnier* (1850) 4 Exch 776; *Marshall's Ltd v Leek* (1900) 17 TLR 26. Cf *Astley v Weldon* (1801) 2 Bos & P 346 at 352 per Lord Eldon CJ (disapproving *Hardy v Martin* (1783) 1 Bro CC 419n); *Pemberton v Vaughan* (1847) 10 QB 87; *National Provincial Bank of England v Marshall* (1888) 40 ChD 112 at 116, CA, per Cotton LJ. In *Mitchel v Reynolds* (1711) 1 P Wms 181 at 187, 194, it was said that the enforcement of a contract in lawful restraint of trade by a penalty was lawful, but the penalty was in fact treated as liquidated damages. A sum may be recovered as liquidated damages although described as a penalty: *Sainter v Ferguson* (1849) 7 CB 716; see generally **DAMAGES** vol 12(1) (Reissue) PARAS 1065-1067; *Upton v Henderson* (1912) 106 LT 839; *Webster v Bosanquet* [1912] AC 394, PC.

2 Cf *Galsworthy v Strutt* (1848) 1 Exch 659 at 663 per Parke B.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(x) Remedies for Breach/439. Effect of offer to pay liquidated sum.

#### **439. Effect of offer to pay liquidated sum.**

A covenantor cannot, by offering to pay the penalty or liquidated damages agreed, in general release himself from his covenant<sup>1</sup>, but it is a question of construction in each case whether or not the fixed sum is intended to be the price of liberty to do the act complained of<sup>2</sup>.

1 *French v Macale* (1842) 2 Dr & War 269.

2 *Roper v Bartholomew* (1823) 12 Price 797; *French v Macale* (1842) 2 Dr & War 269. See **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 272; **CIVIL PROCEDURE** vol 11 (2009) PARA 450.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(x) Remedies for Breach/440. Interim injunctions.

#### **440. Interim injunctions.**

An interim injunction to enforce a contractual obligation in restraint of trade may be granted in appropriate circumstances; there is no rule placing such obligations in a special category for this purpose<sup>1</sup>. However, where the enforceability of a restrictive covenant in an employment contract is in issue in interim proceedings, the court may determine that a speedy trial would be appropriate<sup>2</sup>.

1 *Dairy Crest Ltd v Pigott* [1989] ICR 92, CA; *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, CA, not following dicta in *Fellowes & Son v Fisher* [1976] QB 122, [1975] 2 All ER 829, CA; *Office Overload Ltd v Gunn* [1977] FSR 39, CA.

2 *Lawrence David Ltd v Ashton* [1991] 1 All ER 385, CA.

Halsbury's Laws of England/COMPETITION (VOLUME 18 (2009) 5TH EDITION)/7. TRADE AND FREEDOM TO TRADE/(3) RESTRAINT OF TRADE/(xi) Conflict of Laws/441. Conflict of laws.

#### **(xi) Conflict of Laws**

##### **441. Conflict of laws.**

The rules which govern contracts in restraint of trade are as applicable to foreigners trading in England as to English traders; and if a contract is void as against the public policy of England it will not be enforced in an English court even though made in a country where no objection could be raised to it<sup>1</sup>.

The court may grant relief where the restriction on the covenantor is outside the territory<sup>2</sup>.

1 *Rousillon v Rousillon* (1880) 14 ChD 351 at 369. See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARAS 31, 358.

2 *Blackler v New Zealand Rugby Football League Inc* [1968] NZLR 547, NZ CA.